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U.S. Department of Energy, Office of Nuclear Energy
1000 Independence Ave SW
Washington, DC 20585

RE: Response to Invitation for Public Comment on Consent-based Siting

Public Citizen is a national consumer advocacy organization with more than 400,000 members and supporters across the country. As an organization dedicated to protecting America’s communities and households, we promote policies and regulations that keep families safe from polluting and toxic energy sources and their byproducts.

Public Citizen has a long record of challenging nuclear construction and operation while at the same time fighting for regulations that safeguard our communities against risks associated with nuclear power and radioactive waste. We support the scientific consensus that finds deep geological disposal as the best available solution for isolating nuclear waste – which will be dangerous for millennia – from the public and environment. Further, we believe that we have an obligation to future generations to find a safe, permanent solution for managing nuclear materials they had no part in creating. However, we do not feel that a community, tribal region or state should unwillingly bear this responsibility. For these reasons, we support the Blue Ribbon Commission on America’s Nuclear Future’s¹ recommendation to implement an explicitly adaptive, staged and consent-based approach to nuclear waste disposal.

We welcome the opportunity provided by the U.S. Department of Energy to submit comments on the agency’s nascent effort to design a consent-based siting process.

However we want to emphasize that achieving consent-based siting should not be a means to continue our reliance on this outdated and expensive technology. But rather, lay the foundation for a fair and just process for siting a nuclear waste management facility and well position the federal government to – after decades of failure – meet its nuclear waste management commitments. If done right, consent-based siting could begin to restore the loss of trust and confidence in DOE’s ability to find a viable and permanent solution to our waste crisis.

I. How can the Department ensure that the process for selecting a site is fair?

An exact process for site selection cannot be prescribed. By its very nature, a fair and effective process should be responsive and tailored to those who would be impacted by siting. That said, there are specific principles that should be applied to this process:

Informed - Communities must know what they are consenting to at each stage of the process.

Early and frequent public engagement activities should offer the public, community leaders, experts and agency representatives multiple opportunities to exchange information. Information must be accessible and offered through a variety of platforms. The full range of cost and risks associated with the project must be disclosed and verified, as well as the alternatives being considered. Achieving informed consent is not an end, but an ongoing exercise that responds to new information and findings as well as new generations.

Inclusive - Consent should be granted by those most impacted, including states, tribes and communities. A broad range of state, tribal and local stakeholders should be included in the decision-making process, and efforts must be made to increase the number of community members who recognize themselves and their communities as stakeholders in the siting process. People and entities that would financially benefit from the siting process should be clearly disclosed.

Collaborative - Consent can't be achieved through a top-down process. Activities related to outreach, engagement and education must be planned in coordination with appropriate stakeholders. Any agreements or decision-making must result from mutual input and understanding, and be responsive to the concerns of citizens. Those most impacted should have a voice throughout the process.

Just - Consent should not be bought. Financial compensation and other incentives must be reasonable, not used as coercion, and negotiated with full public disclosure.

Transparent - Consent must be pursued through an open process. Real consent can be achieved and maintained only through trust. Open access to information includes disclosure of funding and any conflicts of interest with the sources of information. All meetings, hearings and communications must be open to the public and on record.

Legitimate - A consent-based siting process must not just be the policy of the Department of Energy, but the law of the land.

Balanced - Consent will require sharing of power among federal executive and legislative branches, state and local governments and people in communities. Negotiating and decision-making power must be shared among affected federal, state and local entities, including those counties through which radioactive waste would be transported. States should also be granted some authority over regulation of the facility.

Flexible - Consent can be withdrawn. The consent-based siting process must provide ample opportunity and defined moments to correct course or completely withdraw from the siting process.

Contractual - States, tribes and communities must have clear recourse if the terms of consent are breached.

Finally, before a consent-based process can be pursued, a baseline criterion for site selection must be met that demonstrates protection of public health and safety, and the environment. Beyond site characterization and standards, there are a number of transportation issues that need to be resolved before this process should move forward. Site selection and transportation are not separate processes. They are inextricably linked and must be presented and planned for as such. It would be unfair to engage a community that does not meet minimum site standards or have not been informed about transportation plans and risks.

II. What models and experience should the Department use in designing the process?

In addition to models and experiences DOE should incorporate into the process, there are models the agency should avoid and experiences that DOE should learn from.

At the outset, it should be recognized that designing and implementing a fair and legitimate process is wholly jeopardized by the proposed consolidated nuclear waste site in Andrews County, Texas. By suggesting that this community has already demonstrated consent, DOE is undermining the very process it is attempting to design. By failing to hold public hearings in Texas and New Mexico, areas that are not only targeted for waste storage, but have vast knowledge and experience with siting waste facilities, DOE is casting its public engagement process as selective and farcical. By refusing to acknowledge DOE's role in the proposed site, that of client, the agency is abdicating its responsibility as custodian of our nation's stockpile of radioactive waste.

Like Texas, DOE must learn from its experience in North Dakota, where the agency attempted to launch a \$35 million, five-year project to determine the feasibility of deep borehole disposal. In January, the agency announced the contractors who won the borehole research and development project, but failed to ever notify the community selected for hosting the project of its existence. Locals did not learn of the project until an article appeared in the newspaper in the capital city of Bismarck. Not even minimal public engagement or notification was given. The project was abandoned in March after the community quickly organized against it.ⁱⁱ There are clear lessons here, but perhaps the least obvious is that DOE cannot function as multiple agencies with separate and conflicting missions.

DOE also needs to look to its predecessor in siting nuclear waste facilities. The Office of the U.S. Nuclear Negotiator, established under the 1987 Nuclear Waste Policy Amendment, was a short-lived attempt to identify a site for hosting a high-level nuclear waste repository or an interim storage facility primarily through the use of incentives and economic benefits. Unsuccessful, the office was eliminated in 1995. Like the consent-based process, the nuclear waste negotiator's goal was to find a volunteer community to host nuclear waste either indefinitely or for the short-term. It would serve DOE to understand explicitly the flaws of the former agency, provide documentation acknowledging the failings of the nuclear waste negotiator and provide recommendations detailing how to avoid repeating them in this new process.

These two examples barely scratch the surface of experiences DOE should learn from and avoid, but rather demonstrate that DOE must reflect on its past and present to move forward with any measure of success. Below we offer five examples of models DOE should consider in its consent-based siting design. Again, this list is not exhaustive, but begins to address some key elements that are currently lacking in DOE activity and the agency's culture.

Public Engagement

In 1996, the National Environmental Justice Advisory Council (NEJAC) – a federal advisory committee to the U.S. Environmental Protection Agency – created a model guide for engaging the public. In 2012, the NEJAC updated the guide, *Model Guidelines for Public Participation*,ⁱⁱⁱ to reflect more current needs, concerns and best practices. The model guide was intended to be adopted by all federal agencies “engaged in public participation efforts and who seek to meaningfully engage environmental justice stakeholders in decision-making processes.” The critical element of the approach detailed in the model guide is that “all persons and groups who are potentially interested, concerned or affected by an action should be included (or given equal opportunity to participate) in the decision-making process.” This reflects the approach necessary for an effective consent-based process and therefore DOE should adopt this model and its recommendations in its design.

Public Funding

Meaningful and substantive public participation can be further achieved by providing funding for those interested in developing independent reports, studies and analysis of the proposed action. Inequality of resources and perceived or real conflict of motives among DOE and the potential host community represent an enormous barrier to building trust and leveling the playing field in the process. Public funding for community representatives and trusted public interested groups could go a long way toward addressing these discrepancies. Unfortunately, in the U.S., the intervener funding model has not been employed for federal actions. However, DOE can look to Canada, which offers intervener funding in the environmental assessment of significant projects as a model - though it should be noted that the Canadian process is not perfect and should not be adopted without modification. Constraints in this model including, limited funding, expectation of intervener financial contributions, short-time frames for funding availability and delayed funding reimbursement to interveners should be addressed in a funding mechanism established for community participation in the siting process.

Institutionalized Community Participation

To ensure initial and ongoing citizen oversight and engagement in the process DOE should consider models that institutionalize community and stakeholder insight and voice into decisions that directly affect their lives, livelihoods and environment, such as citizens' advisory panels. In the U.S. this model has often been implemented after an industrial disaster has occurred – as was the case in Alaska after the Exxon Valdez accident revealed the need for a formal citizen oversight body.^{iv} However, an industry accident or disaster should not be a prerequisite for a citizens' advisory panel. In fact, the United Nations has endorsed such councils as ongoing, structured mechanisms for enhancing communication, collaboration and trust among citizens, government and industry, and for reducing risks of negative environmental and economic impact from industry.^v Citizen councils are an ideal complement to governmental oversight, especially for an agency that has a poor record of being responsive and trusted by the public.

Openness and Transparency

In part, distrust of DOE is rooted in the fact that the agency has a poor record on openness and transparency. In 2009, in an evaluation of agency Open Government Plans – the blueprints for openness mandated by the Obama administration's 2009 Open Government Directive – DOE finished in 35th place, dead last of the agencies required to create a plan.^{vi} While the agency may have improved in the subsequent years, it is still far from adequate. As openness and transparency must be a hallmark of a consent-based siting, DOE must overhaul its policies and culture that deliberately shut the public out. To begin, DOE can adopt the *Best Practices for Open and Accountable Government* first created by the Project on Government Oversight in 2013.^{vii}

Shared Power and Control

In order to establish trust and equity in the siting process, states must share in regulatory and enforcement authority over the proposed nuclear waste facility. Nuclear waste – in all its forms – is the only hazardous material that is exempt from state and local oversight. This must change for states to have a meaningful role in the siting process and any contracts that result from that process.

The Waste Isolation Pilot Plant (WIPP) in New Mexico offers a useful model for power sharing among federal and state regulatory entities. The WIPP facility has been held up as an example for successful siting, but that success came after many delays and near collapses at multiple stages precisely because the federal government attempted to overpower state authority and ignore state input. It was not until legislation was passed to give state authority to regulate waste at WIPP under the Resource Conservation and Recovery Act (RCRA), including issuing a hazardous waste permit for the facility, that the project moved forward.^{viii}

It is this experience – both process and outcome – that DOE should examine in developing a collaborative and balanced process.

III. Who should be involved in the process for selecting a site, and what is their role?

While multiple federal, state and local government and non-governmental actors will likely be involved in the site selection process, we are limiting our comments to the makeup and role of the impacted community.

The National Environmental Policy Act (NEPA) should be the guideline for establishing the boundaries of the impacted community, where federal agency actions typically look at a 50-mile radius. There will likely be several communities within this boundary, which could also cross county and state lines. To facilitate and formalize the communities' role in the siting decision-making process, each community could establish a Citizens' Advisory Panel made up of community stakeholders drawn from community and neighborhood groups; community service organizations (health, welfare, and others); educational institutions and academia; environmental organizations; business; the medical and first responder community; non-governmental organizations; religious communities; indigenous peoples; civic/public interest groups; unions and other employment related organizations. These panels could set up a technical advisory committee as well as issue specific committees to address different areas of the site selection process.

These panels should play a critical role in facilitating public engagement and education, and play a consultation and concurrence role in decision-making and contract negotiations.

IV. What information and resources do you think would facilitate your participation?

All information relevant to the siting of a nuclear waste facility should be made available. There should also be a public record of all meetings, hearings and other events related to siting activity. These records should include, where appropriate, participant list, transcripts, video and materials. But while providing the necessary technical information and a transparent account of siting activity is vital, merely making information available is not enough. Perhaps just as important as the question of what is available is how it will be made available and what strategies will be employed to get community members to interact with the information provided.

Access and engagement need to be considered alongside information. Information should be targeted, applicable and customized to the specific communities including incorporation of language, geography and cultural characteristics. Engagement efforts must include an explanation of why the siting process is relevant to individual groups of stakeholders and, as a foundation for dialogue; the agency should articulate its goals, expectations and limitations.

Communities should also have public funding available to develop their own body of research, information, materials and strategies for disseminating the information to community members. The goal should be for the community to have the technical understanding and assistance to effectively participate in the siting decisions. In fact, information should not be just provided, but exchanged. A two-way process of distributing and receiving information among all stakeholders will foster collaboration and trust. Approaching the community as a resource is essential.

V. What else should be considered?

It is well established that lack of trust is a significant challenge for DOE as the agency mandated to manage our nation's lethal waste for the foreseeable future (and beyond). As the BRC noted in its final report, "the overall record of DOE and of the federal government as a whole, however, has not inspired widespread confidence or trust in our nation's nuclear waste management program."^{ix} With that recognition, the BRC proposed that only the creation of a new, single-purpose organization could provide the stability, focus and credibility essential to getting the waste program back on track. We disagree with this assessment. Creating a new agency does not resolve the issue of trust that plagues the federal government and DOE in particular, when it comes to waste management. Rather DOE should strive to restore trust in the agency and correct the behaviors and culture that has led to this widely acknowledged crisis of confidence.

To that end, DOE should consider using the consent-based siting design process as an opportunity to engage in trust building activities. In addition to the outreach and public input activities already underway, DOE should:

- **Stop promoting nuclear power** - DOE has, in part, framed the need for a nuclear waste repository as essential to maintaining our use of nuclear power and by doing so is alienating members of the public who want a solution to the waste crisis but want to shift away from nuclear as an energy source. DOE's role in managing nuclear waste is to fulfill its legal obligation to take title of the waste from industry and above all to ensure that the waste is safely isolated from the public and the environment. It is not to make nuclear power more attractive as an energy source. By conflating its role as waste manager with nuclear advocate, DOE is, at the oversight, introducing wariness and skepticism into the process.
- **Acknowledge past and present mistakes** – From mismanaged federal facilities and unmanaged contractors, to disregard for public input, to whistleblower retaliation, DOE is far from a model agency. To begin to restore trust, DOE should own its shortcomings and announce a break with the past by taking corrective measures. For example, a recent report by the Government Accountability Office^x found that DOE's nuclear program almost never holds its civilian contractors accountable for unlawful retaliation against whistleblowers. It noted that the agency has taken little or no action against contractors responsible for creating chilled work environments at nuclear sites across the country and noted that the agency has failed to create effective policies for holding those contractors accountable. It is difficult to trust an agency that does not protect and value employees that raise unsafe, illegal or wasteful practices.
- **Be responsive to public input** – A predominant sentiment heard at the eight public meetings DOE hosted around the country was "why should we participate in this process, because our input is never incorporated into your plans or policies." An effective consent-based siting process is going to require DOE to be a partner, not an autocrat. Start now, by reflecting public input in your consent-based siting draft proposal and providing rationale for input that is excluded.
- **Actively oppose efforts by the private sector to license and operate consolidated waste facilities** – The WCS consolidated interim storage proposal in Texas is at cross-purposes with DOE's pursuit of a consent-based siting process and clearly defies the spirit and intent of waste storage management as envisioned by the Nuclear Waste Policy Act. Rather than ignore this affront to DOE's role, responsibility and approach to managing our nation's stockpile of radioactive waste, the agency should actively oppose it and refuse to be a client of WCS.
- **Reconsider consolidated storage** – DOE's pursuit of consolidating nuclear waste at one or more facilities is ill-conceived and motivated by economics rather than safety. In fact, it would needlessly require the waste to be moved twice, it would draw resources and attention away from siting a permanent repository, and it could condemn those temporary sites to indefinite waste management facilities. With exception, waste that is vulnerable and presents an environmental, safety or security

threat should be moved and secured at a second location. At the very least, DOE should embrace policies that reduce the likelihood that a consolidated storage facility, like the proposed site in Andrews County, Texas, would not become a de facto permanent waste management site. Linking the licensing of storage to the licensing of a permanent repository is essential to an effective integrated waste management program and consistent with BRC findings. And provides another reason why the Texas proposal is not only premature, but is derailing efforts to reset our federal waste program and should be opposed.

- **Implement transportation recommendations** – A 2006 National Academy of Science (NAS) report concluded that significantly more research is needed before an unprecedented, large-scale transport program is launched, including: full-scale crash testing of transport packages under severe accident conditions; a study of security issues; and a study of very-long-duration, high-temperature fires. The NAS report found DOE must take steps to adequately plan for a national spent fuel transportation campaign and engage with stakeholders. But nearly a decade later, many of the report’s recommendations have yet to be implemented.^{xi}
- **Refrain from setting deadlines that are unachievable** – DOE’s June 2013, *Strategy for the Management and Disposal of Used Nuclear Fuel and High-Level Radioactive Waste*^{xii} lays out target dates for operations of a pilot interim storage facility by 2021, siting and licensing of a larger interim storage facility to be available by 2025, and availability of a geologic repository by 2048. Yet, Secretary Moniz has already acknowledged that those targets are unrealistic.^{xiii} DOE has a long history of setting deadlines that are aspirational, rather than founded in concrete forethought and planning. Beyond frustration, this fact has contributed to distrust and lack of confidence in the agency’s efficacy.

DOE has asked the public to participate in this process with the promise of good faith and commitment by the agency to overhaul its approach to nuclear waste management. Public Citizen, though deeply disappointed in DOE’s failure to recognize its role and responsibility to the people of Andrews County, offers these comments in kind. We hope that this represents not a futile exercise, but an honest and actual effort to reform not only DOE’s process, but its culture – both of which have led to a nearly complete erosion of public trust – and to believe that the agency has the competence to manage our nation’s nuclear waste dilemma. We urge DOE to incorporate our comments into its consent-based siting design process.

Thank you for your consideration,



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ⁱ http://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf

ⁱⁱ <http://www.exchangemonitor.com/publication/exchange-monitor/doe-axes-north-dakota-borehole-project-2/>

ⁱⁱⁱ <https://www.epa.gov/environmentaljustice/model-guidelines-public-participation>

^{iv} <http://www.pwsrccac.org/>

^v http://www.unep.org/pdf/uyb_2013_new.pdf

^{vi} <http://pogoblog.typepad.com/pogo/2012/02/building-a-better-energygov-how-doe-can-take-steps-towards-achieving-the-principles-of-open-governme.html>

^{vii} <http://www.pogo.org/our-work/resources/2013/best-practices-for-open-and-accountable-government.html?referrer=https://www.google.com/>

viii <http://www.wipp.energy.gov/library/pioneering/LongRoad2.pdf>

ix http://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf

x <https://www.documentcloud.org/documents/2993549-OUO-DRAFT-GAO-16-618-361580.html>

xi <https://www.citizen.org/documents/NASTransportStudy.pdf>

xii

<http://www.energy.gov/sites/prod/files/Strategy%20for%20the%20Management%20and%20Disposal%20of%20Used%20Nuclear%20Fuel%20and%20High%20Level%20Radioactive%20Waste.pdf>

xiii <http://www.platts.com/latest-news/electric-power/washington/us-doe-plans-to-launch-consent-based-process-21649031>