No. 23-

IN THE

Supreme Court of the United States

HOLTEC INTERNATIONAL,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, UNITED STATES OF AMERICA, FASKEN LAND AND MINERALS, LIMITED, AND PERMIAN BASIN LAND AND ROYALTY OWNERS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After more than six years of extensive licensing proceedings, the United States Nuclear Regulatory Commission (NRC) issued petitioner a license to store spent nuclear fuel at a proposed facility in New Mexico. Several opposing parties in the NRC proceeding sought judicial review of petitioner's license in the normal course: before the D.C. Circuit pursuant to the Administrative Order Reviews Act (commonly known as the Hobbs Act), 28 U.S.C. § 2342. Years later, one of those parties initiated a second attack on petitioner's license in the Fifth Circuit, relying on the Fifth Circuit's unique *ultra vires* exception to the Hobbs Act to challenge the NRC's issuance of petitioner's license as beyond the agency's authority. The Fifth Circuit heard the case, deepening a split with the Second, Seventh, Tenth, and Eleventh Circuits which have rejected such an exception to the Hobbs Act.

The Fifth Circuit also decided that the NRC does not have authority under the Atomic Energy Act, 42 U.S.C. § 2011 et seq., and Nuclear Waste Policy Act, 42 U.S.C. § 10131(a) et seq., to issue licenses for spent fuel storage and vacated petitioner's NRC license. In issuing this decision, the Fifth Circuit created yet another split from decades-long precedent in the D.C. Circuit and the Tenth Circuit, where petitioner's facility would be located.

The questions presented are:

1. Whether there is an exception to the party-aggrieved requirement of the Hobbs Act for an *ultra vires* challenge to an agency action.

2. Whether the NRC has the statutory authority to issue licenses for spent nuclear fuel storage facilities.

PARTIES TO THE PROCEEDING

Petitioner, intervenor-appellee below, is Holtec International.

The United States Nuclear Regulatory Commission and United States of America were also appellees below.

Respondents, appellants below, are Fasken Land and Minerals, Limited, and Permian Basin Land and Royalty Owners.

CORPORATE DISCLOSURE STATEMENT

Holtec International has no parent corporation; no shareholder owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The license that is at issue in this case has been the subject of the following proceedings:

- *Fasken v. NRC*, No. 23-60377 (5th Cir. Mar. 27, 2024).
- *Beyond Nuclear, Inc. v. NRC*, No. 20-1187, 20-1225, 21-1104, 21-1147 (D.C. Cir.) (oral argument held Mar. 5, 2024).
- *State ex rel. Balderas v. NRC*, No. CIV 21-0284 (D.N.M.) (preliminary order issued Mar. 10, 2022).

The same type of NRC-issued license for a similar proposed project by another party has also been the subject of proceedings in the Fifth, Tenth, and D.C. Circuits:

- *Texas v. NRC*, No. 21-60743 (5th Cir. Aug. 25, 2023) (reh'g en banc denied Mar 14, 2024) (petition for cert. filed, ___ U.S.L.W. ___ (U.S. June 12, 2024) (No. 23-1300)).
- *Don't Waste Mich. v. NRC*, 21-1048, 21-1055, 21-1056, 21-1179, 21-1227, 21-1229, 21-1230, 21-1231 (D.C. Cir. Jan. 25, 2023)
- *State ex rel. Balderas* v. *NRC*, No. 21-9593 (10th Cir. Feb. 10, 2023).

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This is the second of two related cases from the Fifth Circuit creating two different circuit splits and undermining the federal government's ability to regulate nuclear materials throughout the United States.

In the first case, *Texas v. NRC*, App., *infra*, 4a-35a, *reh'g en banc denied* App., *infra*, 36a-57a, the Fifth Circuit relied on a "judge-made, *ultra vires* exception" to the Hobbs Act to hear a case that failed to meet statutory requirements, creating a split with four other circuit courts. *Texas*, App., *infra*, 54a (Higginson, J., dissenting). The Fifth Circuit's exception to the Hobbs Act in turn allowed that court to find that the NRC does not have authority to issue licenses for spent nuclear fuel storage, thus creating a second split with the Tenth and D.C. Circuits. *Texas*, App., *infra*, 21a. Shortly after issuing the *Texas* decision, the Fifth Circuit applied the same theory to this case, App., *infra*, 1a, and vacated petitioner's license for a spent nuclear fuel storage facility in New Mexico.

Even though it created a circuit split, the Fifth Circuit recognized the *ultra vires* exception to the party-aggrieved requirement of the Hobbs Act, erroneously claiming it was necessary to open the courthouse door to *ultra vires* claims. But the door to the courthouse was already open, and a litigant can be a party aggrieved in compliance with the Hobbs Act while also challenging an *ultra vires* agency action. Here Fasken could have done both in the D.C. Circuit, where Sierra Club and Beyond Nuclear have already raised Hobbs Act claims challenging as

ultra vires NRC's authority to issue petitioner's license.

The Fifth Circuit, nevertheless, has discarded both the door to the courthouse and the structure holding the door in place, inviting litigants to ignore the requirements of the Hobbs Act. Under *Texas* and this case, a litigant can skip the agency's proceedings, wait until after the eleventh hour to challenge a license after it has been issued, and attack the same license in multiple circuit courts. This deprives the agency and the licensee of the opportunity to address the litigant's concerns or to right the alleged wrongs, and serves only to reinstate the judicial inefficiencies that the Hobbs Act was intended to avoid: delay and duplication of effort. In the end, the Fifth Circuit has opened the door for third parties to impose on the agencies subject to the Hobbs Act and the circuit courts duplicative, tardy, and unnecessary litigation.

The Fifth Circuit also—despite the NRC's decades-long history of licensing spent nuclear fuel storage facilities and the views of two other circuit courts—found that the NRC "has no statutory authority" under the Atomic Energy Act or the Nuclear Waste Policy Act to issue a license for a spent nuclear fuel storage facility. *Texas*, App., *infra*, 47a. In so doing, the Fifth Circuit decided that the NRC lacks "a broad grant of authority to issue licenses for any type of possession of special nuclear material or source material" or long-lived byproduct material and, thus, could not issue licenses for the storage of spent nuclear fuel. *Texas*, App., *infra*, 27a. This is plainly contrary to the language of the Atomic Energy Act, and the D.C. Circuit and Tenth Circuit

analysis must prevail over the Fifth Circuit's analysis in *Texas*. This Court should also overturn the Fifth Circuit's decisions because they cast a long shadow over numerous NRC materials licenses across the United States, including those for existing spent fuel storage facilities, uranium enrichment facilities, and nuclear fuel fabrication facilities.

For these reasons, Petitioner Holtec International respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The court of appeals opinion (App., *infra*, 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 27, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix. App., *infra*, 337a-344a.

STATEMENT

A. Legal Framework

1. The Hobbs Act

The Hobbs Act, 28 U.S.C. 2341 *et seq*., governs judicial review of the orders of several federal agencies, including the NRC. See 42 U.S.C. §§ 2239(a)-(b); 28 U.S.C. § 2342. Under the Hobbs Act, "part[ies] aggrieved by the final order" may petition

for review in the federal courts of appeals. 28 U.S.C. § 2344 ("Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies."). In NRC adjudicatory proceedings, a "party" is a "person whose interest may be affected by the proceeding," and who is admitted to such proceeding. 42 U.S.C. § 2239(a)(1)(A). In addition, if a person pursues party status but is rejected by the agency, that person can nevertheless appeal the NRC's decision rejecting its party status. 42 U.S.C. § 2239(b)(1).

The Hobbs Act's text provides no exceptions to the "party aggrieved" requirement. 28 U.S.C. § 2344. Nonetheless, in 1982 the Fifth Circuit announced an exception, in dicta, to the Hobbs Act party-aggrieved requirement for challenges to an agency action that is alleged to be beyond the agency's authority. *Am. Trucking Ass'ns, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982); *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984). Four other circuit courts have explicitly refused to follow the Fifth Circuit and have found no exception to the party-aggrieved requirement for alleged *ultra vires* agency actions. See, e.g., *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112-113 (2d Cir. 1999) (declining to follow the Fifth Circuit decisions *American Trucking* and *Wales Transportation* as dicta); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.,* 799 F.2d 317, 335-336 (7th Cir. 1986) (declining to follow the Fifth Circuit decision in *American Trucking*); *State ex rel Balderas v. NRC*, 59 F. 4th 1112, 1123-24 (10th Cir. 2023) (declining to follow the Fifth Circuit); *Nat'l Ass'n of State Util. Consumer Advocs. v. FCC*, 457 F.3d 1238, 1249

(2006) (11th Cir. 2006) (declining to follow the Fifth Circuit). The Fifth Circuit has recognized that its *ultra vires* exception has been "squarely rejected by some of our sister circuits," further calling its validity into question. *Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005); see also *Merch. Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 n.16 (5th Cir. 1993). Nonetheless, the Fifth Circuit used this exception in *Texas* and this case to avoid the Hobbs Act's party-aggrieved requirement.

2. The Nuclear Legal Framework

a. In 1954, Congress created in the Atomic Energy Act, 42 U.S.C. 2011 *et seq.*, a comprehensive regime for federal regulation over the then-nascent civilian nuclear industry.[1] The Atomic Energy Act was drafted with flexibility in mind, rather than with an intent to proscribe each specific permissible action of the NRC. Indeed,

> [i]n the Presidential Message recommending the legislation which culminated in the Atomic Energy Act of 1954, it was said that flexibility was a peculiar *desideratum* and that, absent an accumulation of experience with the new civilian industry hopefully to be brought into being, "it would be unwise to try to anticipate by law all of the many problems that are certain to arise."

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[1] In the Atomic Energy Act, the "Atomic Energy Commission was given broad regulatory authority over the development of nuclear energy." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 526 (1978). This authority was later transferred to the NRC by the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 *et seq*.

Siegel v. AEC, 400 F.2d 778, 783 (D.C. Cir. 1968) (citing H.R. Rep. No. 83-328, at 7 (2d. Sess. 1954)) (emphasis supplied). Instead, Congress enacted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel*, 400 F.2d at 783.

While the Atomic Energy Act avoided detailed instructions for the NRC, its intended goals are clearly set forth. Congress intended for the Atomic Energy Act "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes," 42 U.S.C. § 2013(d), and it intended to establish "*Government control* of the possession, use, and production of [both] atomic energy and special nuclear material" in order to "make the maximum contribution to the common defense and security and the national welfare."[2] 42 U.S.C. § 2013(c) (emphasis added). Thus, the Atomic Energy Act vested the Federal Government with exclusive regulatory control over the possession, use, and production of *both* atomic energy and special nuclear material. As a result, the Atomic Energy Act

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[2] Special nuclear material is defined as "(1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material." 42 U.S.C. § 2014(aa).

Source material is defined as "(1) uranium, thorium, or any other material which is determined by the Commission . . . to be source material." 42 U.S.C. § 2014(z).

sets forth an overall framework for Federal Government regulation of the possession, use, and production of atomic energy through utilization facility licenses, 42 U.S.C. §§ 2133(d)-(e); certain methods of producing special nuclear material through production facility licenses, 42 U.S.C. § 2133(b); and the possession and other uses or production of special nuclear material (including uranium enrichment and fuel fabrication) through special nuclear materials licenses. 42 U.S.C. § 2073.

In developing the Atomic Energy Act, Congress also directed the NRC to

> establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property.

42 U.S.C. § 2201(b); see also 42 U.S.C. § 2093 (providing authority to issues licenses for source material); 42 U.S.C. § 2111 (providing authority to issues licenses for byproduct material). As a result, the "comprehensive regulatory scheme created by the [Atomic Energy Act] embraces the production, possession, and use of three types of radioactive materials—source material, special nuclear material, and byproduct material," *Train v. Colo. Pub. Int. Rsch. Grp., Inc.*, 426 U.S. 1, 6-7 (1976) (footnotes omitted).

b. For fifty years, the NRC has used its Atomic Energy Act authority to issue special nuclear materials licenses for spent nuclear fuel[3] storage facilities, both at and away from reactors. As one example starting in the 1970s, the Commission issued General Electric Company a special nuclear materials license to store spent nuclear fuel at a non-reactor location in Morris, Illinois. *See* General Electric Co., Issuance of Facility License for Possession Only, 39 Fed. Reg. 32,345, 32,456 (Sept. 6, 1974) (regarding continuation of special nuclear materials license to receive and possess spent nuclear fuel at GE Morris).

c. Congress later developed and enacted the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101 *et seq*. The GE Morris license and the NRC's issuance of licenses for spent fuel storage were specifically discussed during Congress's development of the Nuclear Waste Policy Act. 128 Cong. Rec. 32,945, 32,946 (1982). Yet Congress did not, in the Nuclear Waste Policy Act itself or in the intervening decades, amend the Atomic Energy Act or otherwise mandate or even suggest that the Commission stop licensing these spent nuclear fuel storage facilities or vacate the existing licenses.

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[3] Spent nuclear fuel is "fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing." 42 U.S.C. § 10101(23). See also 42 U.S.C. § 2014(dd) ("The terms 'high-level radioactive waste' and 'spent nuclear fuel' have the meanings given such terms in section 10101 of this title."). Spent nuclear fuel is comprised of special nuclear material, source material, and byproduct material.

B. Factual and Procedural Background

1. The Holtec NRC Proceeding

The NRC's adjudicatory proceeding for the Holtec license began on July 16, 2018, when the NRC published a notice in the Federal Register providing the public an opportunity to participate by (1) requesting a formal evidentiary hearing to challenge Holtec's application and (2) petitioning for leave to intervene in the proceeding. See 83 Fed. Reg. 39,919 (July 16, 2018).

Fasken responded to this notice on September 14, 2018, filing a motion to dismiss Holtec's license application based on the NRC's asserted lack of authority to issue the license. The Secretary of the Commission considered this motion to be a hearing request and a proposed contention. Thus, Fasken's first contention in the underlying agency proceeding alleged that the Holtec application should be rejected because it purportedly contemplated storage contracts with the U.S. Department of Energy and such contracts would be illegal under the Nuclear Waste Policy Act. *In re Holtec International*, 91 N.R.C. 167, 173-174 (2020). Other organizations, Beyond Nuclear and Sierra Club, requested a hearing, petitioned to intervene, and filed similar claims. *Id.* at 173. An NRC Atomic Safety and Licensing Board appointed by the Commission rejected Fasken's contention, and Fasken appealed that decision to the Commission. *Id.* at 175-176. On April 23, 2020, the Commission affirmed the Board decision rejecting Fasken's contention and Beyond Nuclear and Sierra Club's similar claims. *Id.* at 176.

Fasken later proposed additional contentions, and the Board and Commission issued subsequent orders denying or dismissing all of Fasken's challenges. See *In re Holtec International*, 93 N.R.C. 215, 217 (2021). Shortly after its claims were resolved at the NRC, Fasken filed a Hobbs Act challenge in the D.C. Circuit. See Petition for Review, *Fasken Land & Minerals, Ltd. v. NRC*, No. 21-1147 (D.C. Cir. July 25, 2021), ECF No. 1904236. The NRC issued a license for the Holtec spent fuel storage facility on May 9, 2023. 88 Fed. Reg. 30,801 (May 12, 2023).

2. The Holtec D.C. Circuit Proceeding

The Commission decisions in the Holtec proceeding have been under review in the D.C. Circuit since 2020, when Don't Waste Michigan and Beyond Nuclear first filed petitions for review under the Hobbs Act, which were later consolidated with subsequent petitions from Sierra Club and Fasken. See Clerk's Orders Consolidating Cases, *Beyond Nuclear v. NRC*, No. 20-1187 (D.C. Cir. June 20, 2020), ECF No. 1848608 (consolidating *Don't Waste Mich. v. NRC* (No. 20-1225)), ECF No. 1895402 (consolidating *Sierra Club v. NRC* (No. 21-1104)), and ECF No. 1904266 (consolidating *Fasken Land & Minerals, Ltd. v. NRC* (No. 21-1147)).

Fasken initially sought review of the NRC's disposition of its statutory authority contention by including the Commission's decision on the issue in its petition for review in the D.C. Circuit. Petition for Review, *Fasken Land & Minerals, Ltd.*, No. 21-1147 (D.C. Cir. June 25, 2021), ECF No. 1904236. Later, however, Fasken chose to pursue only some of its underlying claims in the D.C. Circuit, focusing on its seismic and geological concerns and ignoring its

challenge to NRC's licensing authority. Final Brief of Fasken at 14-16, *Beyond Nuclear*, No. 20-1187 (D.C. Cir. Jan. 23, 2024), ECF No. 2036986. Other parties, Beyond Nuclear and Sierra Club, pursued claims in the D.C. Circuit challenging the NRC's authority to issue the Holtec license. See Final Brief of Beyond Nuclear at 31-36, *Beyond Nuclear*, No. 20-1187, (D.C. Cir. Jan. 22, 2024), ECF No. 2036820; Final Brief of Environmental Petitioners at 19-22, *Beyond Nuclear*, No. 20-1187 (D.C. Cir. Jan. 23, 2024), ECF No. 2036920. The decision in the D.C. Circuit case is pending.

3. The Holtec Fifth Circuit Proceeding

Two months after the NRC issued Holtec's license, Fasken filed its petition in the Fifth Circuit challenging the NRC's authority to issue the Holtec license. Fasken reiterated its underlying claims on NRC's authority to issue the license but did not justify pursuing its claims years after the NRC had first rejected those claims in its petition to intervene. Instead, Fasken filed its claims under the cloak of a challenge to the NRC's purportedly *ultra vires* issuance of the Holtec license, relying on the Fifth Circuit's *ultra vires* exception argued in *Texas*. App., *infra*, 18a.

The Federal Government moved to transfer Fasken's Fifth Circuit challenge to the D.C. Circuit given the ongoing D.C. Circuit proceeding. See App, *infra*, 3a. However, in briefing the parties all recognized that a decision in *Texas*, a case regarding substantially the same issues for a different facility, would bind a Fifth Circuit panel on the NRC's authority to issue the Holtec license and the

existence of an *ultra vires* exception to Hobbs Act requirements. App., *infra*, 2a.

At this point, a Fifth Circuit panel had rendered a decision in the *Texas* case and vacated the NRC license of a similar spent fuel storage facility owned by Interim Storage Partners, LLC, in Andrews County, Texas. That panel concluded that: (1) it could hear the case under its *ultra vires* exception to the party aggrieved requirements in the Hobbs Act; (2) the NRC lacked the authority to license a spent fuel storage facility under the Atomic Energy Act; (3) the facility license "contradict[ed] Congressional policy expressed in the Nuclear Waste Policy Act," and (4) the NRC's issuance of a license for a spent fuel storage facility was contrary to the major questions doctrine. *Texas*, App., *infra*, 34a-35a, 56a-57a. The Fifth Circuit panel granted the petitions for review in Texas and vacated the Interim Storage Partners license. *Texas*, App., *infra*, 5a.

The Federal Government and Intervenor Interim Storage Partners timely sought rehearing *en banc* of the panel decision. Nine judges voted against rehearing the case, while seven judges voted in favor of rehearing *en banc*. In a March 14, 2024, concurrence, six judges set forth their reasons for denying rehearing, while four judges issued a dissent against the rehearing denial. *Texas*, App., *infra*, 37a.

After a final decision was rendered in the *Texas* case, the Fifth Circuit found that because *Texas* involved a "materially identical license in a materially identical procedural posture," absent the "[c]ourt granting rehearing en banc in *Texas* . . . the panel's consideration of this case will be controlled by [*Texas*]." App., *infra*, 2a. Consequently, because the

Fifth Circuit found that its holding in *Texas* dictated the outcome here, on March 27, 2024, the court granted Fasken's petition for review and vacated Holtec's spent fuel storage facility license. The court also denied the Federal Government's motion to transfer the case to the D.C. Circuit as moot. App., *infra*, 2a-3a.

On June 12, 2024, the Federal Government and Intervenor Interim Storage Partners filed Petitions for Certiorari before this Court seeking a review of the *Texas* decision. Federal Government Petition for Writ of Certiorari, *Texas*, ___ U.S.___ (No. 23-1300); Interim Storage Partners Petition for Writ of Certiorari, *Texas*, ___ U.S.___ (No. 23-1300). The *Texas* case and this case raise substantially the same issues regarding the Hobbs Act and the NRC's authority to issue licenses for spent fuel storage.

REASONS FOR GRANTING THE PETITION

The *Texas* decision and the decision in this case created two different circuit splits, one on judicial review under the Hobbs Act, and the second on the scope of the NRC's statutory authority to issue nuclear materials licenses. Both of these circuit splits are worthy of this Court's consideration. First, in creating an *ultra vires* exception to the party-aggrieved requirements of the Hobbs Act, the Fifth Circuit created a split with four other circuit courts, undermined the goals of the Hobbs Act, and destabilized the process for judicial review for the federal agencies and agency orders subject to that Act. Second, in an inexplicable reading of the Atomic Energy Act, the Fifth Circuit split with the D.C. Circuit and the Tenth Circuit by limiting the NRC's ability to issue nuclear materials licenses in a

manner directly contrary to the NRC's plain text statutory authority. This decision not only resulted in the vacatur of the two licenses at issue in *Texas* and this case but also potentially undermines the federal government's ability to regulate a broader swath of the nuclear industry, leaving other nuclear materials licenses subject to substantial uncertainty. This Court's intervention is necessary to prevent further damage to the process of judicial review for agencies subject to the Hobbs Act and to the NRC's authority to issue nuclear materials licenses.

I. The Fifth Circuit Erred By Ignoring The Plain Text Of The Hobbs Act And The Faithful Interpretations Of Four Other Circuits.

A. There Is No *Ultra Vires* Exception To The Hobbs Act.

There is no dispute that the plain language of the Hobbs Act allows only "part[ies] aggrieved by the final order" of an agency subject to the Act to petition for review in the federal courts. 28 U.S.C. § 2344. There is also no dispute that the text of the Hobbs Act provides no exceptions to this party-aggrieved status requirement. See 28 U.S.C. § 2344. Yet, the Fifth Circuit in *Texas* (and applied in this case) adds an extra textual gloss to the statute, suspending this requirement for any attack on an agency action claimed to be *ultra vires*. *Texas*, App., *infra*, 45a (allowing any person to appeal "where 'the agency action is attacked as exceeding its power'") (internal brackets omitted).

Four other Circuits have already considered, and rejected, this extra-textual "exception." These

Courts have observed that the Hobbs Act *limits* Circuit court review to petitions filed by aggrieved parties. As bluntly stated by the Seventh Circuit, the Hobbs Act "limits review to petitions filed by parties, and that is that." *In re Chicago,* 799 F.2d at 335.

The alleged existence of an *ultra vires* agency action is not enough to overcome Congress' decision to limit the reach of the Circuit courts. As the Seventh and Tenth Circuits have correctly observed, the courts "may not decide a case just because that would be a good idea; power must be granted, not assumed." *Id.*; see also *Balderas*, 59 F.4th at 1123. And, as the Second, Seventh, Tenth, and Eleventh Circuits have all recognized, an *ultra vires* "exception" to the Hobbs Act is particularly dangerous. "'[E]xceeding the power' of an agency may be a synonym for 'wrong,' " such that the so-called "'exception' could be invoked in every case," *eliminating* the statutory limits on the courts. *Erie-Niagara Rail*, 167 F.3d at 112 (citing *In re Chicago,* 799 F.2d at 335); see also *Balderas*, 59 F.4th at 1123-24, *National Ass'n of State Util. Consumer Advocs.*, 457 F.3d at 1249.

The Fifth Circuit's *en banc* concurrence in *Texas* claims that it is a "misconception[ ]" "that the *ultra vires* exception means no more than that an agency 'got it wrong' per [Administrative Procedure Act] standards." *Texas*, App., *infra*, 48a (Jones, J., concurring). The concurrence claims that the *ultra vires* exception is narrower because "the term literally refers to being 'outside' the agency's power, *i.e.*, in defiance of the limits placed by Congress in the agency's governing statute or the Constitution."

Texas, App., *infra*, 48a-49a. The concurrence then concludes, without any explanation whatsoever, that "if ever there were a case in which an agency acted *ultra vires,* it should be this case." *Texas*, App., *infra*, 49a.

On the contrary, as described below, it has been the long-established precedent of two other Circuit courts that the NRC is acting within the bounds of its statutory authority when issuing licenses for spent fuel storage. Given the D.C. Circuit and Tenth Circuit precedent to the contrary, and the NRC's decades-long licensing practice, it is not clear how the NRC's issuance of a license in this case is the epitome of an *ultra vires* agency action.

The dissent to the *en banc* rehearing denial has by far the better argument. "Parsing which merits arguments here fall under our court's *ultra vires* exception shows its unworkability—and the risk for judicial aggrandizement when courts can pick and choose when to abide by Congress's limits." *Texas*, App., *infra*, 24a (Higginson, J., dissenting). As the dissent cogently observes, the panel heard the case only after "speculat[ing] about what a petitioner's challenges are *really* about to decide whether Congress's clear jurisdictional limitation on their power to hear cases *really* applies," since the panel decision decided that the *ultra vires* exception allowed it to hear some claims (that the NRC violated the Atomic Energy Act and the Nuclear Waste Policy Act) but not other claims (that the NRC violated the Administrative Procedure Act or National Environmental Policy Act). *Texas*, App., *infra*, 56a (emphasis supplied). Considering that "[a]n agency exceeds its power whenever it violates

the law," there is no rational explanation for how the panel parsed these claims to define an *ultra vires* action. *Texas*, App., *infra*, 57a. With no rational bounds to the definition of an *ultra vires* action, the exception "reads out the difference . . . that Congress created between broader judicial review under the Administrative Procedure Act and narrower judicial review under the Hobbs Act." *Texas*, App., *infra*, 57a.

It is clear that the Fifth Circuit's *ultra vires* exception is extra-textual and ripe for abuse, and the four Circuits that have refused to adopt it are correct. This Court should take this case and reject the *ultra vires* exception to prevent endless extra-statutory challenges to the agencies that are subject to Hobbs Act review.

B. The *Ultra Vires* Exception Is An End Run Around The Requirements Of The Hobbs Act.

The Fifth Circuit's *en banc* concurrence argues that its *ultra vires* exception is consistent with the practice of this Court ensuring that "Article III courts are not totally closed to plaintiffs" who claim that an agency acts beyond its delegated powers. *Texas*, App., *infra*, 47a (Jones, J., concurring) (citing *Leedom v. Kyne,* 358 U.S. 184 (1958)). In the alternative, the concurrence also argues that the *ultra vires* exception is not necessary because the parties in that case, Fasken and Texas, would otherwise qualify as parties aggrieved under the Hobbs Act. *Texas*, App., *infra*, 44a. These conflicting rationales demonstrate the concurrence's irrationality. There is no need for an *ultra vires* exception to ensure judicial review *when the parties*

could have sought judicial review in compliance with the Hobbs Act.

Indeed, Fasken has not used the *ultra vires* exception as a means to ensure the availability of judicial review in this case, because Fasken already had the right to judicial review. Fasken participated in the Holtec licensing proceeding, disputing various aspects of the proceeding. Fasken is a party aggrieved as to those claims, and it used that status years ago to initiate a separate, ongoing challenge in the D.C. Circuit. Fasken could have, but chose not to, pursue its challenge to the NRC's authority to issue the Holtec license in the pending D.C. Circuit proceeding. In fact, Beyond Nuclear and Sierra Club are pursuing those claims.

Fasken did not need the *ultra vires* exception to obtain judicial review. Instead, it used the exception to avoid the statutory constraints of judicial review under the Hobbs Act. Congress intended the Hobbs Act to ensure the "elimination of multiple suits challenging the same Commission order [and] limitation of the time for filing review to 60 days after entry of the order." *Simmons v. ICC*, 716 F. 2d 40, 44 (D.C. Cir. 1983) (citing H.R. Rep. No. 1569, at 4-6, 93d Cong., 2d Sess. (1974), S. Rep. No. 500, at 3-4, 93d Cong., 1st Sess. (1973));see also *Carpenter v. DOT*, 13 F.3d 313, 316 (9th Cir. 1994) ("By creating a strict time frame for review and bypassing district courts, Congress hoped [the Hobbs Act would] increase the speed, efficiency and consistency of judicial review."). By using the *ultra vires* exception, Fasken seeks to avoid these limitations. It filed multiple suits in separate judicial circuits against the same NRC license, and (in this proceeding) filed

its challenge after the 60-day Hobbs Act deadline from the NRC decisions rejecting Fasken's contentions. In short, Fasken has used the Fifth Circuit's *ultra vires* exception as an excuse to flout the requirements of the Hobbs Act, not as a means to ensure judicial review.

Unless remedied by this Court, the Fifth Circuit's weaponization of this end run around the requirements of the Hobbs Act means that every agency that is subject to the Act can expect duplicative, tardy, and unnecessary litigation arising from similar challenges in the future.

II. The Fifth Circuit's Decision To Limit The NRC's Statutory Authority Is Plainly Inaccurate And Contrary To Settled Precedent.

A. The Fifth Circuit's Decision Creates A Circuit Split.

The D.C. Circuit and the Tenth Circuit have long held that the NRC has the statutory authority to issue licenses for the storage of spent nuclear fuel because: (1) the Atomic Energy Act unambiguously grants the NRC such authority, and (2) the Nuclear Waste Policy Act did not revoke that authority. See *Bullcreek v. NRC*, 359 F.3d 536, 538 (D.C. Cir. 2004), *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1232 (10th Cir. 2004). Thus, the NRC has for decades had the unassailable, court-approved authority to license spent nuclear fuel storage facilities, until last year when the Fifth Circuit decided otherwise in *Texas*, App., *infra*, 4a-35a, and this case, App., *infra*, 1a-3a.

In *Bullcreek*, the D.C. Circuit held that the Atomic Energy Act "authorized the NRC to regulate the possession, use, and transfer of the constituent materials of spent nuclear fuel, including special nuclear material, source material, and byproduct material." 359 F.3d at 538. Thus, the D.C. Circuit concluded that "it has long been recognized that the [Atomic Energy Act] confers on the NRC authority to license and regulate the storage and disposal of such fuel," citing this Court's decision in *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n,* 461 U.S. 190, 207 (1983), among other cases. *Bullcreek*, 359 F.3d at 538. The D.C. Circuit further observed that "Congress was aware of the NRC's regulations for licensing private away-from-reactor storage facilities." *Id.* at 542. Yet, Congress left the NRC's authority under the Atomic Energy Act fully intact, despite crafting the Nuclear Waste Policy Act, an otherwise comprehensive piece of legislation on nuclear waste policy. *Id.*

Shortly after *Bullcreek* was decided, the Tenth Circuit found the D.C. Circuit's analysis persuasive and declined to revisit the issue in *Skull Valley*. See 376 F.3d at 1232. Nearly twenty years later, the Tenth Circuit reiterated that the NRC "bears the authority to license the private use of facilities to store spent nuclear fuel," *Balderas*, 59 F.4th at1115-16, while the D.C. Circuit, again, explained that "the NRC may promulgate regulations governing the possession and use of nuclear material" and "[t]his authority permits the NRC 'to license and regulate the storage and disposal of spent nuclear fuel.'" *Don't Waste Mich. v. NRC*, No. 21-1048, 2023 WL 395030, at *1 (D.C. Cir. Jan. 25, 2023) (per curiam) (quoting *Bullcreek*, 359 F.3d at 538).

This interpretation of the NRC's statutory authority is correct and should be upheld, and the Fifth Circuit decision to the contrary should be rejected.

B. The Fifth Circuit's Application Of The Atomic Energy Act Is Egregiously Wrong.

The Fifth Circuit parts with the D.C. and Tenth Circuits by misreading the Atomic Energy Act to reach several demonstrably erroneous conclusions. First, the Fifth Circuit incorrectly found that the NRC has only limited authority under the Atomic Energy Act to issue licenses over special nuclear material and cannot license the storage of spent nuclear fuel. See *Texas*, App., *infra*, 27a, 34a. Second, the Fifth Circuit wrongly found that the NRC cannot issue licenses for the byproduct material in spent nuclear fuel. See *Texas*, App., *infra*, 27a-28a. Thus, the Fifth Circuit concluded that the NRC has no authority to issue licenses to store spent nuclear fuel either through its authority over nuclear material. See *Texas*, App., *infra*, 28a.

The plain text of the Atomic Energy Act demonstrates the many errors in the *Texas* analysis.

a. First, the Atomic Energy Act clearly provides the NRC with the authority to issue special nuclear materials licenses for four purposes: (1) "for the conduct of research and development activities," (2) for use in a research reactor licensed under 42 U.S.C. § 2134, (3) for use under a production or utilization facility licensed under 42 U.S.C. § 2133, and (4) "*for such other uses as the Commission determines to be appropriate to carry out the purposes of* [*the Atomic Energy Act*]." 42 U.S.C. §§ 2073(a)(1)-(4) (emphasis

added). This broad grant of authority is plain on its face, but in *Texas*, the Fifth Circuit eliminated the fourth category, *i.e.*, NRC's authority to issue licenses for "other uses as the Commission determines to be appropriate" under 42 U.S.C. § 2073(a)(4).

The Fifth Circuit interpreted this broad authority to issue licenses for "other uses" to mean that the Atomic Energy Act "authorizes the Commission to issue [nuclear materials] licenses only for certain enumerated purposes," including "various types of research and development," and for "utilization or production facilities for industrial or commercial purposes." *Texas*, App., *infra*, 26a-27a (internal quotations omitted). The Fifth Circuit pulls language from an entirely separate part of the Atomic Energy Act—regarding source material—to limit the NRC's authority to issue special nuclear materials licenses for "such other uses that the Commission . . . 'determines to be appropriate to carry out the purposes of th[e] chapter'" to *only those* that the Commission "'approves . . . as an aid to science and industry.'" *Texas*, App., *infra*, 26a (citing 42 U.S.C. § 2093(a)(4)). According to the Fifth Circuit, this extra-textual gloss is necessary because "[p]rinciples of statutory interpretation require these grants [in the special nuclear material provision] be read in light of the other, more specific purposes listed [in the source material provision]—namely *for certain types of research and development*." *Texas*, App., *infra*, 26a (emphasis added).

Thus, under the Fifth Circuit's convoluted interpretation of the Atomic Energy Act, the NRC may only issue special nuclear materials licenses for

research and development purposes and utilization or production facilities. See *Texas*, App., *infra*, 26a. That interpretation must be wrong because it renders the NRC's authority to issue licenses for "other uses" as mere statutory surplusage. It is also plainly wrong because it directly contradicts the statutory history of the Atomic Energy Ac, as Congress deliberately "authorize[d] the Commission to issue licenses for the possession of special nuclear material within the United States *for uses which do not fall expressly within the present provisions of subsection 53a* [(42 U.S.C. § 2073(a)(1)-(3))]." Joint Committee on Atomic Energy, Amending the Atomic Energy Act of 1954, H.R. Rep. No. 85-2272, at 1 (1958) (emphasis added); see 42 U.S.C. Section 2073(a)(4). In this respect, the Fifth Circuit's analysis contradicts both the plain text of the Atomic Energy Act and its statutory history and must be overturned.

b. Second, the Fifth Circuit further deviates from the text of the Atomic Energy Act by deciding that the Act does not "confer[] a broad grant of authority to issue licenses for any type of possession of special nuclear material or source material." *Texas*, App., infra, 27a.

This cannot be the case. The NRC has a mandate to provide "*Government control* of the *possession*, use, and production of" "special nuclear material." 42 U.S.C. § 2013(c) (emphasis added). In addition, the plain language of the Atomic Energy Act further provides that the NRC is authorized to "establish by rule, regulation, or order, such standards and instructions to govern the *possession* and use of special nuclear material, source material, and

byproduct material." 42 U.S.C. § 2201(b) (emphasis added). The NRC must be able to issue licenses for the possession of these nuclear materials in order to maintain control over the possession of special nuclear material and to regulate the possession of special nuclear material, source material, and byproduct material. Yet, the Fifth Circuit analysis reads these entire provisions of the Atomic Energy Act. Its decision to limit the NRC's authority is plainly contrary to the Act and must be overturned.

c. Third, the Fifth Circuit found that the NRC does not have authority over the byproduct material in spent nuclear fuel by once again ignoring the text of the Atomic Energy Act. The Fifth Circuit interpreted the definition of byproduct material based on provisions relating to a particular byproduct material, radium-226, and, thus, purported to limit NRC authority to only byproduct materials like radium-226 that "emit radiation for significantly less time than spent nuclear fuel." *Texas*, App, *infra*, 27a. This analysis ignores the plain text of the Atomic Energy Act which, since its enactment, has defined byproduct material as "any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material." 42 U.S.C. § 2014(e)(1). The radium-226 language was added decades later to the Atomic Energy Act as an example of *naturally occurring* radioactive material (not reactor-created radioactive material). Pub. L. No. 109-58, 119 Stat. 594, 806, 807 (Aug. 8, 2005).

Again, the Fifth Circuit has ignored the Atomic Energy Act to arbitrarily limit the NRC's authority

over nuclear materials. Given the lack of textual support for this misinterpretation of the NRC's authority over byproduct material, the Fifth Circuit's decision again must be overturned.

C. The Fifth Circuit Further Erred In Finding That The Nuclear Waste Policy Act Is Relevant To The NRC's Authority.

Having found no authority in the Atomic Energy Act, the Fifth Circuit then decided that the Nuclear Waste Policy Act also does not provide the NRC with any independent authority to license the storage of spent nuclear fuel. *Texas*, App., infra, 33a-34a. This conclusion, even if correct, is irrelevant to this case.

The NRC's clear authority to license spent fuel storage is derived from the Atomic Energy Act, not from the Nuclear Waste Policy Act. The Nuclear Waste Policy Act did not need to provide the NRC with independent statutory authority to regulate spent nuclear fuel, because, contrary to the Fifth Circuit's decision, that authority is already found in the Atomic Energy Act. As the D.C. Circuit correctly observed in *Bullcreek*,

> private away-from-reactor storage was already regulated by the NRC under the [Atomic Energy Act] prior to the [Nuclear Waste Policy Act]. It was not an anomaly for the [Nuclear Waste Policy Act] to focus on regulating those "supplements" that the [Nuclear Waste Policy Act] itself added, namely federal storage programs, and to leave the pre-existing regulatory scheme as it found it. In the absence of irreconcilability between the [Atomic Energy Act] and the

> [Nuclear Waste Policy Act], there is no basis to conclude that in enacting the [Nuclear Waste Policy Act] Congress implicitly repealed or superseded the NRC's authority.

359 F.3d at 543. Once granted in the Atomic Energy Act, there was no need for Congress to address the issue again in the Nuclear Waste Policy Act, particularly given Congressional acknowledgement during its enactment of the Nuclear Waste Policy Act that the NRC was already issuing licenses for spent nuclear fuel storage to facilities such as GE Morris. 128 Cong. Rec. 32,945, 32,946 (1982).

Whether the Nuclear Waste Policy Act grants the NRC any additional authority to license spent nuclear fuel storage, beyond that already granted in the Atomic Energy Act, is simply irrelevant to this case.

D. The Fifth Circuit's Reasoning Confounds The Regulation Of Nuclear Materials.

This Court should also grant certiorari and overturn the Fifth Circuit's decisions in *Texas* and this case because of the potentially broader implications on the NRC's issuance of nuclear materials licenses. The Fifth Circuit's interpretation would undercut long-standing NRC-licenses like the license issued to the GE Morris facility which has actively stored spent nuclear fuel for 50 years. See 39 Fed. Reg. at 32,456. It also cannot be reconciled with spent nuclear fuel storage at decommissioned and operating reactor sites, which necessarily requires the possession of special nuclear material, source material, and byproduct material.

The Fifth Circuit's rationale is also inconsistent with the NRC's authority to issue licenses for nuclear fuel cycle activities like uranium enrichment and fuel fabrication. The Fifth Circuit claims that "the definitions of utilization and production facilities" include fuel fabrication or enrichment facilities, limiting the impact of its decision to only spent nuclear fuel storage facilities. *Texas*, App., infra, 27a. But fuel fabrication and uranium enrichment facilities are neither production nor utilization facilities, and, in fact, uranium enrichment is specifically carved out of the production facility definition. 42 U.S.C. § 2014(v). As a result, the Fifth Circuit's interpretation of the Atomic Energy Act subverts not only the licenses in *Texas* and this case but also those for other spent fuel storage facilities, in addition to uranium enrichment and fuel fabrication facilities, both of which are necessary for the continued operation of the nuclear industry.

For this reason, the Fifth Circuit's rationale must be overturned.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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JUNE 2024

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 27, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-60377
Summary Calendar

FASKEN LAND AND MINERALS, LIMITED;
PERMIAN BASIN LAND AND ROYALTY OWNERS,

Petitioners,

versus

NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

Filed March 27, 2024

Appeal from the Nuclear Regulatory Commission
Agency No. 72-1051

Before JONES, ELROD, and WILSON, *Circuit Judges.*

PER CURIAM:*

In September 2021 the Nuclear Regulatory Commission (NRC) issued a license to Interim Storage

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Partners, LLC, to establish a facility to store nuclear waste temporarily in Andrews County, Texas. *See Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 833–35 (5th Cir. 2023) [hereinafter *Texas v. NRC*], *reh'g en banc denied*, 2024 WL 1108700 (5th Cir. Mar. 14, 2024). Texas, Fasken Land and Minerals, Ltd., (Fasken), and Permian Basin Land and Royalty Owners (PBLRO) petitioned this court to set aside that license. *Id.* at 834–35. In that appeal, a panel of this court first held that Fasken and PBLRO had standing under the Constitution and the Hobbs Act to challenge the NRC's actions. *Id.* at 835–40. It then held that the NRC lacked statutory authority to issue the license. *Id.* at 840–44. Accordingly, this court granted the petitions for review and vacated the license. *Id.* at 844. The NRC filed a petition for rehearing en banc on October 24, 2023, which this court denied on March 14, 2024. *See Texas v. Nuclear Regul. Comm'n*, No. 21-60743, — F.4th —, 2024 WL 1108700 (5th Cir. Mar. 14, 2024).

Shortly before the panel issued its opinion in *Texas v. NRC*, Fasken and PBLRO filed the petition for review at issue in this case. They challenge a different license issued by the NRC in May 2023 to Holtec International to establish a facility to store nuclear waste in Lea County, New Mexico. The parties, correctly, agree that *Texas v. NRC* involved a "materially identical license in a materially identical procedural posture" and that "absent the [c]ourt granting rehearing en banc in *Texas* [*v. NRC*] . . . , the panel's consideration of this case will be controlled by [Texas v. NRC]." Because this court's holding in *Texas v. NRC* dictates the outcome here, we GRANT Fasken's and PBLRO's petition for review and VACATE the Holtec

license. The NRC's motion to transfer the petition for review to the United States Court of Appeals for the District of Columbia Circuit is DENIED AS MOOT.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 25, 2023

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-60743

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; FASKEN LAND AND MINERALS, LIMITED; PERMIAN BASIN LAND AND ROYALTY OWNERS,

Petitioners,

versus

NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,

Respondents.

Appeal from the Nuclear Regulatory Commission
Agency No. 72-1050

Before JONES, HO, and WILSON, *Circuit Judges.*

JAMES C. HO, *Circuit Judge*:

Nuclear power generation produces thousands of metric tons of nuclear waste each year. And such waste has been accumulating at nuclear power plants throughout the United States for decades. Congress has mandated that

such waste be permanently stored in a geologic repository. But the development, licensing, and construction of that repository has stalled.

To address this problem, the Nuclear Regulatory Commission has asserted that it has authority under the Atomic Energy Act to license temporary, away-from-reactor storage facilities for spent nuclear fuel. Based on that claim of authority, the Commission has issued a license for Interim Storage Partners, LLC, a private company, to operate a temporary storage facility on the Permian Basin, in Andrews County, Texas. Fasken Land and Minerals, Ltd., a for-profit organization working in oil and gas extraction, and Permian Basin Land and Royalty Owners ("PBLRO"), an association seeking to protect the interests of the Permian Basin, have petitioned for review of the license.[1] So has the State of Texas, which argues, *inter alia*, that the Atomic Energy Act doesn't confer authority on the Commission to license such a facility.

Texas is correct. The Atomic Energy Act does not confer on the Commission the broad authority it claims to issue licenses for private parties to store spent nuclear fuel away-from-the-reactor. And the Nuclear Waste Policy Act establishes a comprehensive statutory scheme for dealing with nuclear waste generated from commercial nuclear power generation, thereby foreclosing the Commission's claim of authority. Accordingly, we grant the petition for review and vacate the license.

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1. For the remainder of this opinion, we use the term "Fasken" to refer to Fasken Land and Minerals, Ltd. and PBLRO collectively, unless addressing an issue where it's necessary to distinguish them.

Appendix B

I.

This case is the latest development in a decades-long debate over nuclear power and waste regulation. Accordingly, we provide a brief overview of relevant historical and technical background before delving into the specifics of the licensing proceedings challenged here.

A.

The United States began producing nuclear waste in the 1940s, first as a byproduct of nuclear weapons development and then as a byproduct of the commercial nuclear power industry. Blue Ribbon Commission on America's Nuclear Future, Report to the Secretary of Energy 19 (Jan. 2012) https://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf [hereinafter BRC Report]. The first nuclear reactor was demonstrated in 1942, and Congress authorized civilian application of atomic power through the Atomic Energy Act of 1946. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983).

The Act granted regulatory authority over nuclear energy to the Atomic Energy Commission. *See Union of Concerned Scientists v. NRC*, 735 F.2d 1437, 1443 n.1, 237 U.S. App. D.C. 1 (D.C. Cir. 1984). But the Energy Reorganization Act of 1974 disbanded that agency and redistributed its authority, as relevant here, to the Nuclear Regulatory Commission. *Id.* After Congress passed the Atomic Energy Act, commercial production of nuclear energy boomed.

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Commercial nuclear energy is produced through a series of industrial processes, which include the mining and processing of nuclear fuel, the use of the fuel in a reactor, and the storage and ultimate disposal or reprocessing of that fuel. BRC REPORT at 9. Once nuclear fuel has been used in a reactor for about four to six years, it can no longer produce energy and is considered used or spent. *Id.* at 10. That spent fuel is removed from the reactor. *Id.*

Spent nuclear fuel is "fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing." 42 U.S.C. § 10101(23). It's "intensely radioactive" and "must be carefully stored." *Pac. Gas & Elec. Co.*, 461 U.S. at 195. The spent fuel is first placed in wet pool storage for cooling, where it remains for at least five years, but may remain for decades. BRC REPORT at 11. Once the spent nuclear fuel has cooled sufficiently in wet storage, it's generally transferred to dry cask storage. *Id.*

At first, there was little concern regarding storage for spent fuel. *See* BRC REPORT at 19-20; *Idaho v. DOE*, 945 F.2d 295, 298-99 (9th Cir. 1991). There was a widespread belief within the commercial nuclear energy industry that spent fuel would be reprocessed. *Idaho*, 945 F.2d 295, 298-99 (9th Cir. 1991). But the private reprocessing industry collapsed in the 1970s, *id.*, and growing concerns led President Ford to issue a directive deferring commercial reprocessing and recycling, which President Carter later extended. BRC REPORT at 20. Although President Reagan reversed that policy, "for a variety of reasons, including costs, commercial reprocessing has never resumed." *Id.*

Appendix B

After years of accumulating spent nuclear fuel in nuclear power plants throughout the country, *see* 42 U.S.C. § 10131(a)(3), Congress enacted the Nuclear Waste Policy Act in 1982. That Act sought to "devise a permanent solution to the problems of civilian radioactive waste disposal." *Id.* It tasked the Department of Energy with establishing "a repository deep underground within a rock formation where the waste would be placed, permanently stored, and isolated from human contact." *Nat'l Ass' of Regul. Util. Comm'rs v. DOE*, 680 F.3d 819, 821, 401 U.S. App. D.C. 15 (D.C. Cir. 2012). Yucca Mountain in Nevada was chosen as the only suitable site for the repository. *See* 42 U.S.C. § 10172. The decision drew widespread opposition in Nevada. BRC Report at 22.

Decades of delay ensued. Despite a Congressional mandate that the Department of Energy start accepting waste from the States by January 31, 1998, *see* 42 U.S.C. § 10222(a)(5)(B), "by the mid-1990s, the Department of Energy made clear that it could not meet the 1998 deadline, and it came and went without the federal government accepting any waste." *Texas v. U.S.*, 891 F.3d 553, 555-56 (5th Cir. 2018).

In 2008, the Department of Energy finally submitted its license application for the Yucca Mountain repository to the Commission. *In re Aiken Cnty.*, 725 F.3d 755, 258 (D.C. Cir. 2013). But the Commission "shut down its review and consideration" of the application. *Id.* By its own admission, the Commission had no intention of reviewing the application, *id.*, even though the Nuclear Waste Policy Act mandates a decision be made within three years of submission. *See* 42 U.S.C. § 10134(d).

In light of the delays and controversy, the Obama Administration decided to halt the work on the Yucca Mountain repository. BRC REPORT at vi. The Obama Administration instead formed the Blue Ribbon Commission on America's Nuclear Future, which concluded that a consent-based approach to siting nuclear waste storage facilities would be preferred to the Yucca Mountain policy. *See id.* at vii—x.

Spent nuclear fuel continues to accumulate at reactor sites across the country. Some estimates suggest the U.S. inventory of spent nuclear fuel may exceed 200,000 metric tons by 2050. BRC REPORT at 14. The commercial nuclear power industry as a whole is estimated to generate between 2,000 and 2,400 metric tons of spent nuclear fuel each year. *Id.* And there are thousands of metric tons of spent fuel in various sites where commercial reactors no longer operate. *Id.*

B.

After the Blue Ribbon Commission embraced a consent-based approach for siting nuclear waste storage facilities, the governments of Texas and New Mexico expressed support for establishing facilities within the states. Then-Governors Rick Perry of Texas and Susana Martinez of New Mexico wrote letters supporting the establishment of facilities within their respective states. And Andrews County—a rural community located near the Texas-New Mexico border—passed a resolution in support of siting a spent nuclear fuel facility there.

Based in part on these expressions of support, Waste Control Specialists, LLC applied to the Commission for a license to operate a consolidated interim storage facility for high-level spent nuclear fuel in Andrews County. Andrews County is located within the Permian Basin, one of the country's largest oil basins and a top global oil producer.

The Commission began its environmental review of the proposed facility in accordance with the National Environmental Policy Act. *See* 42 U.S.C. § 4321 *et seq.* But the application anticipated that the Department of Energy would take title to the spent nuclear fuel. Some stakeholders challenged the legality of that provision as prohibited by the Nuclear Waste Policy Act. Waste Control Specialists then asked the Commission to suspend its review.

Approximately a year later, Interim Storage Partners, LLC—a partnership between the original applicant, Waste Control Specialists, and another company—asked the Commission to resume its review of the now-revised license application. In its summary report on the scoping period, the Commission noted that it had received comments expressing concerns that the facility would become a *de facto* permanent disposal facility and that the license would be illegal under existing regulations. The Commission responded that such comments were outside the scope of the environmental impact statement.

In December 2019, the Atomic Safety and Licensing Board—the independent adjudicatory division of the

Commission—terminated an adjudicatory proceeding regarding the license application. Before the proceeding was terminated, Fasken timely filed five contentions alleging that the Commission violated the National Environmental Policy Act and its own regulations. The Board denied each one. The following month, Fasken filed a motion to reopen the record along with a motion to amend a previously filed contention. The Board denied the motions.

The Commission published a draft environmental impact statement in May 2020. The Commission received approximately 2,527 unique comments on the draft environmental impact statement, and many opposed the facility. One comment was a letter from Texas Governor Greg Abbott urging the Commission to deny the license application because of the lack of a permanent repository and the importance of the Permian Basin to the nation's energy security and economy. The Texas Commission on Environmental Quality submitted a comment that the licensing lacks public consent and doesn't properly account for the possibility that Texas would become the permanent solution of spent nuclear fuel disposal if the permanent repository isn't developed by the expiration of the facility's 40-year license term.

Fasken also submitted various comments. Its comments noted the uniqueness of the Permian Basin, the danger of transporting spent nuclear fuel to the facility, the lack of community consent, and the possibility that the facility could become a *de facto* permanent facility. Based on the draft environmental impact statement, Fasken

also filed a second motion to reopen the adjudicatory proceeding. The Board once again denied the request.

The Commission issued the final environmental impact statement in July 2021. It recommended the license be issued, and noted that concerns regarding Yucca Mountain and the need for a permanent repository fell outside its scope. In an appendix, the Commission responded to timely comments, including those from Petitioners. The Commission responded to concerns that the facility would become a *de facto* permanent repository by noting the application was only for a temporary facility.

The following September, the Texas Legislature passed H.B. 7. The statute makes it illegal to "dispose of or store high level radioactive waste" in Texas. Governor Abbott sent a letter to the Commission with a copy of H.B. 7. He reiterated that "the State of Texas has serious concerns with the design of the proposed ISP facility and with locating it in an area that is essential to the country's energy security." The next day, Fasken submitted an environmental analysis critiquing various aspects of the final environmental impact statement.

A few days later, the Commission issued the license.

Texas and Fasken have now petitioned this court for review of the license. Texas asks that the license be set aside. And Fasken asks that we suspend all further activities on the facility and remand to the Commission for a hard look analysis. While this case was pending before this court, Fasken and others who sought but were denied

intervention in the agency adjudication had a petition for review pending before the D.C. Circuit appealing the denials of their intervention. *See Don't Waste Michigan v. NRC*, 2023 U.S. App. LEXIS 2022, 2023 WL 395030 (Jan. 25, 2023). The petition was denied in January 2023. 2023 U.S. App. LEXIS 2022, [WL] at *1. Interim Storage Partners, LLC intervened in this case to represent its interests.

II.

We begin with jurisdiction. The Commission challenges this court's jurisdiction to hear the petitions for review for lack of both constitutional standing and statutory standing. We consider each argument in turn and find neither succeeds.

A.

As a preliminary matter, the Commission suggests that Petitioners forfeited constitutional standing by failing to argue it in their opening briefs. We disagree.

Neither Petitioner argued constitutional standing beyond their general jurisdictional statements. Generally, a petitioner is required "to present specific facts supporting standing through citations to the administrative record or affidavits or other evidence attached to its opening brief, *unless standing is self-evident*." *Sierra Club v. EPA*, 793 F.3d 656, 662 (6th Cir. 2015) (emphasis added, quotation omitted). A petitioner may reasonably believe standing to be self-evident when "nothing in the record alerted [the]

petitioners to the possibility that their standing would be challenged." *Am. Libr. Ass'n v. FCC*, 401 F.3d 489, 492, 365 U.S. App. D.C. 207 (D.C. Cir. 2005). That's the case here.

From the earliest stages of this proceeding, the Commission has challenged jurisdiction on statutory standing grounds only. It twice moved to dismiss, but neither motion challenged constitutional standing. Accordingly, Petitioners could reasonably assume it was self-evident. *Cf. Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 542 n.4 (5th Cir. 2019) ("overlook[ing] Petitioners' decision to include only a cursory discussion of standing because . . . they had a good-faith (though mistaken) belief that standing would be both undisputed and easy to resolve"). And—once constitutional standing was challenged—both Petitioners provided well-developed legal arguments with citations to the record and evidence to show their standing. Petitioners haven't forfeited constitutional standing.

The "irreducible constitutional minimum" of standing requires that Petitioners "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). The causation elements of the constitutional standing analysis are easily met: Petitioners' alleged injuries directly result from the issuance of the license (traceability), and an order from this court could vacate the license (redressability). So only injury in fact is at issue.

The Commission argues that the licensing and eventual operation of the storage facility doesn't injure either Texas or Fasken. We disagree. Because "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," we may proceed even if only one of the Petitioners has standing. *Rumsfeld v. FAIR*, 547 U.S. 47, 52 n.2, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006). But here both Petitioners successfully assert an injury resulting from the license.

Texas meets the injury-in-fact requirement because the license preempts state law. Texas has "a sovereign interest in the power to create and enforce a legal code." *Tex. Off. of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 449 (5th Cir. 1999) (quotation omitted) (holding that Texas has standing to challenge the FCC's assertion of authority over an aspect of telecommunications regulation that the State believed it controlled). And we have held that the preemption of an existing state law can constitute an injury. *Texas v. United States*, 787 F.3d 733, 749 (5th Cir. 2015). "A state has standing based on a conflict between federal and state law if the state statute at issue regulates behavior or provides for the administration of a state program, but not if it simply purports to immunize state citizens from federal law." *Id.* (cleaned up). Here the issuance of the license and resulting operation of the facility directly conflicts with H.B. 7.

The Texas Legislature has enacted legislation that prevents the storage of high-level radioactive waste, including spent nuclear fuel, within the State except at currently or formerly operating nuclear power reactors. The legislation also amends Texas statutes to add that

"a person, including the compact waste disposal facility license holder, may not dispose of or store high level radioactive waste in this state." Tex. Health & Safety Code § 401.072. Although a non-binding, declaratory state statute would not be enough to confer standing, here there's an enforceability conflict between the license and operation of the facility, which authorizes storage of high-level radioactive waste in Texas, and H.B. 7, which proscribes such storage. *Cf. Virginia v. Sebelius*, 656 F.3d 253, 270 (4th Cir. 2011) (a state statute that is merely a "non-binding declaration [and] does not create any genuine conflict . . . creates no sovereign interest capable of producing injury-infact"). That's enough for Texas to assert an injury.

Fasken also has standing based on its proximity to radioactive materials. To establish injury in an environmental case, there's a "geographic-nexus requirement." *Biological Diversity*, 937 F.3d at 538. "The Supreme Court has ruled that geographic remoteness forecloses a finding of injury when no further facts have been brought forward showing that the impact in those distant places will in some fashion be reflected where the plaintiffs are." *Id.* (cleaned up). *See also id.* at 540 ("when a person visits an area for aesthetic purposes, pollution interfering with his aesthetic enjoyment may cause an injury in fact," if "the aesthetic experience was actually offensive to the plaintiff"). Fasken has provided evidence of its members' geographic proximity to the facility. Some of Fasken's members own land within four miles of the facility, draw water from wells beneath the facility, drive within a mile of the facility, use rail lines the facility would use, and travel on highways within a few hundred

feet of the rail lines that transport spent nuclear fuel to the facility. In the context of radioactive materials, such proximity is sufficient to establish injury. *See Duke Power Co. v. Caroline Env't Study Grp., Inc.*, 438 U.S. 59, 74, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978) ("[T]he emission of non-natural radiation into appellees' environment would also seem a direct and present injury."). *See also Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1266, 362 U.S. App. D.C. 204 (D.C. Cir. 2004) (finding a petitioner living 18 miles from Yucca Mountain had standing); *Kelley v. Selin*, 42 F.3d 1501, 1509 (6th Cir. 1995) (finding petitioners who "own[] land in close proximity to . . . the proposed site for spent fuel storage" had "alleged sufficient injury to establish standing").

PBLRO also has associational standing. "Associational standing is a three-part test: (1) the association's members would independently meet the Article III standing requirements; (2) the interests the association seeks to protect are germane to the purpose of the organization; and (3) neither the claim asserted, nor the relief requested requires participation of individual members." *Biological Diversity*, 937 F.3d at 536 (quoting *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006)). Each of those elements is met. First, some of its members have an injury because they live, work, or regularly drive close the facility. And as we've already noted, *see supra*, the causation elements are met. Next, "the germaneness requirement is undemanding and requires mere pertinence between the litigation at issue and the organization's purpose." *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 550 n.2 (5th Cir. 2010) (quotations omitted). This factor is easily

met because PBLRO was created specifically to oppose the facility. Last, there's no reason to believe that PBLRO is unable to represent its members' interests without their individual participation. *See id.* at 551-53 (noting this prong usually isn't met when the relief sought is damages for individual members or the claim requires fact-intensive-individual inquiry).

B.

Petitioners seeking to challenge a final order from the Commission also need standing under the Administrative Orders Review Act, generally known as the Hobbs Act. *See Reytblatt v. NRC*, 105 F.3d 715, 720, 323 U.S. App. D.C. 101 (D.C. Cir. 1997) ("[T]he Hobbs Act requires (1) 'party' status (i.e., that petitioners participated in the proceeding before the agency), and (2) aggrievement (i.e., that they meet the requirements of constitutional and prudential standing).") (citation omitted).

The Hobbs Act vests "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of . . . final orders of the" Commission on the federal courts of appeals. 28 U.S.C. § 2342. (The Act actually refers to the Atomic Energy Commission. But the Energy Reorganization Act of 1974 abolished that agency and transferred its licensing and related regulatory functions to the Nuclear Regulatory Commission. *See* 42 U.S.C. § 5841(a), (f).)

Under the Act, "[a]ny party aggrieved by the final order may . . . file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344.

Courts "have consistently held that the phrase 'party aggrieved' requires that petitioners have been parties to the underlying agency proceedings, not simply parties to the present suit." *ACA Int'l v. FCC*, 885 F.3d 687, 711, 435 U.S. App. D.C. 1 (D.C. Cir. 2018). *See also Am. Trucking Ass'ns v. ICC*, 673 F.2d 82, 84 (5th Cir. 1982) (per curiam) ("The word 'party' is used in a definite sense in the [Hobbs Act], and limits the right to appeal to those who actually participated in the agency proceeding."). The Commission argues that neither Texas nor Fasken has standing under the Hobbs Act because neither is a "party aggrieved."

"To be an aggrieved party, one must have participated in the agency proceeding under review." *Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984). Here, both Petitioners participated in the agency proceeding—Texas commented on its opposition of the issuance of the license and Fasken attempted to intervene and filed contentions. But according to the Commission, neither form of participation is sufficient to confer party status under the Hobbs Act.

The Commission argues that Texas doesn't have party status because "participating in the appropriate and available administrative procedures is the statutorily prescribed prerequisite to invocation of the Court's jurisdiction," and submitting comments doesn't accord with the degree of formality of the proceedings in this license adjudication.[2]

2. In the alternative, the Commission argues that "even if this Court were to determine that dismissal of [Texas's] Petition for Review is not required as a matter of jurisdiction, the same result

The Commission takes a different approach with Fasken. It argues that, as a party denied intervention, Fasken may only challenge the order denying it

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is nonetheless required as a matter of non-jurisdictional, mandatory exhaustion." Not so. The Commission relies on *Fleming v. USDA*, which held that "even nonjurisdictional exhaustion requirements . . . forbid judges from excusing non-exhaustion" and that "if the government raises [such an] exhaustion requirement, the court must enforce it." 987 F.3d 1093, 1099, 451 U.S. App. D.C. 49 (D.C. Cir. 2021). But neither the Hobbs Act nor the Atomic Energy Act impose a mandatory exhaustion requirement. The Commission's argument implicitly equates the exhaustion requirements in the Horse Protection Act and the Prison Litigation Reform Act—both of which are discussed in *Fleming*—to the Hobbs Act and Atomic Energy Act. These statutes aren't comparable. Both the Horse Protection Act and the Prison Litigation Reform Act have explicit exhaustion requirements. *See* 7 U.S.C. § 6912(e) ("[A] person shall exhaust all administrative appeal procedures established by the Secretary [of Agriculture] or required by law before the person may bring an action in a court of competent jurisdiction."); 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such an administrative remedies as are available are exhausted."). But neither the Hobbs Act nor the Atomic Energy Act do. *See* 28 U.S.C. § 2344 (no exhaustion requirement); 42 U.S.C. § 2239(b) (same).

It's also worth noting that caselaw suggests that so long as the petitioner is a "party aggrieved" and the basis for the challenge was brought before the agency by *some* party— *even if* not the by the petitioner—that's enough for the case to move forward. *See Reytblatt*, 105 F.3d at 720-21; *Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1109, 296 U.S. App. D.C. 144 (D.C. Cir. 1992). It'd make little sense to interpret the Hobbs Act as imposing an exhaustion requirement while allowing a petitioner to bring a claim it did not itself bring before the agency.

intervention. From the Commission's perspective, if a putative intervenor has failed to obtain party status, it can't later seek review of the final judgment on the merits.

The plain text of the Hobbs Act merely requires that a petitioner seeking review of an agency action be a "party aggrieved." 28 U.S.C. § 2344. The text makes no distinction between different kinds of agency proceedings. *See Gage v. AEC*, 479 F.2d 1214, 1218, 156 U.S. App. D.C. 231 (D.C. Cir. 1973). Nor does it suggest that a petitioner who went through the procedures to intervene in an adjudication can't be a party aggrieved. In fact, it's clear that the function of the "party aggrieved" status requirement is to ensure that the agency had the opportunity to consider the issue that petitioners are concerned with. *See, e.g.*, *id.* at 1219 ("The 'party' status requirement operates to preclude direct appellate court review without a record which at least resulted from the fact-finder's focus on the alternative regulatory provisions which petitioners propose.") (emphases omitted).

In sum, the plain text of the Hobbs Act requires only that a petitioner have participated—in some way—in the agency proceedings, which Texas did through comments and Fasken did by seeking intervention and filing contentions. But caselaw suggests that's not enough.

Precedent from other circuits suggests that neither Texas nor Fasken are parties aggrieved for Hobbs Act purposes. The D.C. Circuit has read the Hobbs Act to contemplate participation in "the appropriate and available administrative procedures." *Id.* at 1217. And it has interpreted this to mean that the "degree of

participation necessary to achieve party status varies according to the formality with which the proceeding was conducted." *Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1192, 260 U.S. App. D.C. 390 (D.C. Cir. 1987). *But see ACA Int'l*, 885 F.3d at 711-712 (noting that in at least some limited circumstances commenting may be enough in certain non-rulemaking proceedings). The D.C. Circuit and at least one other circuit apply this heightened participation requirement. *See Ohio Nuclear-Free Network v. NRC*, 53 F.4th 236, 239, 459 U.S. App. D.C. 266 (D.C. Cir. 2022); *Alabama Power Co. v. ICC*, 852 F.2d 1361, 1368, 271 U.S. App. D.C. 394 (D.C. Cir. 1988). *See also State ex rel. Balderas v. NRC*, 59 F.4th 1112, 1117 (10th Cir. 2023). The D.C. Circuit has also said that, when an agency requires intervention, those who sought but were denied intervention lack standing to seek judicial review. *Water Transp. Ass'n*, 819 F.2d at 1192. *See also NRDC v. NRC*, 823 F.3d 641, 643, 422 U.S. App. D.C. 325 (D.C. Cir. 2016) ("To challenge the Commission's grant of a license renewal . . . a party must have successfully intervened in the proceeding by submitting adequate contentions under [the Commission's regulations].").

The D.C. Circuit embraces readings of the Hobbs Act that impose an extra-textual gloss by requiring a degree of participation not contemplated in the plain text of the statute. We think the fairest reading of the Hobbs Act doesn't impose such additional requirements. But we ultimately don't need to resolve that tension, because the Fifth Circuit recognizes an exception to the Hobbs Act party-aggrieved status requirement that's dispositive of this issue here.

Appendix B

This circuit recognizes an *ultra vires* exception to the party-aggrieved status requirement. In *American Trucking Associations, Inc. v. ICC*, this court noted "two rare instances" where a "person may appeal an agency action even if not a party to the original agency proceeding"—(1) where "the agency action is attacked as exceeding [its] power" and (2) where the person "challenges the constitutionality of the statute conferring authority on the agency." 673 F.2d at 85 n.4 (quotation omitted).[3]

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3. The Commission's various arguments that this exception isn't applicable are unavailing. It's true that we've recognized the exception is "exceedingly narrow." *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993). And it's also true that other circuits have refused to adopt it. *See Balderas*, 59 F.4th at 1123-24; *Nat'l Ass'n of State Util. Consumer Advocs. v. FCC*, 457 F.3d 1238, 1250 (11th Cir. 2006); *Erie-Niagara Rail Steering Comm. v. STB*, 167 F.3d 111, 112-13 (2d Cir. 1999); *In re Chicago, Milwakee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986). But the exception remains good law in this circuit. Neither the Commission nor the court have identified any case overturning the exception. And to the extent that the Commission claims the exception was mere dicta in *American Trucking*, that argument fails because we've since applied the exception in *Wales Transportation, Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984). Under our circuit's rule of orderliness, we are bound to follow *American Trucking* and *Wales Transportation* because they haven't been overturned by the en banc court. The Commission is also wrong in suggesting the exception is limited to challenges of ICC orders. While it's true that both *American Trucking* and *Wales Transportation* involved challenges to ICC orders, neither case limits the exception's application to the ICC. *See Am. Trucking*, 673 F.2d at 85 n.4 (referring to agency proceedings, not ICC proceedings); *Wales Transp.*, 728 F.2d at 776 n.1 (same).

This exception only allows us to reach those portions of the Petitioners' challenges that argue the Commission acted beyond its statutory authority. *See Wales Transp.*, 728 F.2d at 776 n.1 (allowing petitioner to proceed despite not having participated in the agency proceeding on only those claims that challenged the agency's authority under the statute). Accordingly, we must consider which, if any, of the Petitioners' challenges fall within that category.

Texas makes three merits arguments: (1) the Commission lacks the statutory authority to license the facility; (2) the license issuance violated the Administrative Procedure Act; and (3) the Commission violated the National Environmental Policy Act by failing to assess the risks of a potential terrorist attack. The first argument falls within the exception. It attacks the Commission for licensing a facility without the authority to do so under the Atomic Energy Act, and in conflict with the Nuclear Waste Policy Act.

Fasken makes four merits arguments: (1) the Commission violated the National Environmental Policy Act and Administrative Procedure Act by allowing a licensing condition that violates the Nuclear Waste Policy Act; (2) the Commission's assumptions about when the permanent repository will be operational are arbitrary and capricious; (3) the Commission adopted an unreasonably narrow purpose statement; and (4) the Commission violated the National Environmental Policy Act and Administrative Procedure Act by accepting the applicant's unreasonable site selection. The first of these challenges falls within the exception. Fasken's argument

centers on the contention that the Commission acted beyond its statutory authority by issuing a license with a condition expressly prohibited by the Nuclear Waste Policy Act.

III.

The Commission has no statutory authority to issue the license. The Atomic Energy Act doesn't authorize the Commission to license a private, away-from-reactor storage facility for spent nuclear fuel. And issuing such a license contradicts Congressional policy expressed in the Nuclear Waste Policy Act. This understanding aligns with the historical context surrounding the development of these statutes.

A.

Under the Atomic Energy Act, the Commission retains jurisdiction over nuclear plant licensing and regulation. *See* 42 U.S.C. § 5842. It has authority to regulate the construction and operation of nuclear power plants. *See* 42 U.S.C. §§ 2011-2297h-13. *See also Union of Concerned Scientists*, 735 F.2d at 1438-39 (summarizing the two-step licensing procedure for nuclear power plant operation).

The Act also confers on the Commission the authority to issue licenses for the possession of "special nuclear material," *see* 42 U.S.C. § 2073, "source material," *see id.* § 2093, and "byproduct material," *see id.* § 2111. *See also* 42 U.S.C. §§ 2014(aa), (z), (e) (defining each term, respectively). Special nuclear material, source material,

and byproduct material are constituent materials of spent nuclear fuel. *See Bullcreek v. NRC*, 359 F.3d 536, 538, 360 U.S. App. D.C. 184 (D.C. Cir. 2004). The Commission argues that, because it has authority to issue licenses for the possession of these constituent materials, that means it has broad authority to license storage facilities for spent nuclear fuel.

But this ignores the fact that the Act authorizes the Commission to issue such licenses only for certain enumerated purposes—none of which encompass storage or disposal of material as radioactive as spent nuclear fuel.

Sections 2073 and 2093 specify that licenses may be issued for various types of research and development, *see* 42 U.S.C. §§ 2073(a)(1)-(a)(2), 2093(a)(1)-(a)(2). It also permits such other uses that the Commission either "determines to be appropriate to carry out the purposes of th[e] chapter," *id.* § 2073(a)(4), or "approves . . . as an aid to science and industry," *id.* § 2093(a)(4). Principles of statutory interpretation require these grants be read in light of the other, more specific purposes listed—namely for certain types of research and development. *Cf. U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 185, 131 S. Ct. 2313, 180 L. Ed. 2d 187 (2011) ("When Congress provides specific statutory obligations, we will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated.").

Both these sections also allow the agency to issue licenses "for use under a license issued pursuant to section 2133 of th[e] title." *Id.* 42 U.S.C. §§ 2073(a)(3), 2093(a)(3)

(same). Section 2133 details the Commission's authority to issue licenses for "utilization or production facilities for industrial or commercial purposes." *Id.* § 2133(a). Utilization and production have specific definitions under the statute. *See id.* §§ 2014 (cc) (defining utilization facilities); 2014(v) (defining production facilities). And the definitions of utilization and production facilities are about nuclear reactors and fuel fabrication or enrichment facilities—not storage or disposal, as the Commission admits in its briefing. *See id.* Neither § 2073 nor § 2093 confers a broad grant of authority to issue licenses for any type of possession of special nuclear material or source material.

The same is true for § 2111. That section authorizes the Commission "to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed." *Id.* § 2111(a). It also specifies conditions under which certain types of byproduct material may be disposed. *Id.* § 2111(b). And the types of byproduct material covered by § 2111(b) emit radiation for significantly less time than spent nuclear fuel.

That section cross-references the definition of byproduct materials in § 2014(e)(3)-(4), which refers to radium-226 and other material that "would pose a threat similar to the threat posed by . . . radium-226 to the public health and safety." That's important because some of the isotopes in spent nuclear fuel have much longer half-lives than radium-226. The "intensity of radiation

from radioactive materials decreases over time" and the "time required for the intensity to decrease by one-half is referred to as the 'half-life.'" NRC, Frequently Asked Questions (FAQs) Regarding Radium-226 § A.1, https://scp.nrc.gov/narmtoolbox/radium%20faq102008.pdf. Radium-226 has a half-life of 1600 years. *Id.* Spent nuclear fuel, on the other hand, is composed of a variety of radioactive isotopes of elements produced in the nuclear fission process. NRC, Radioactive Waste Backgrounder 1, https://www.nrc.gov/docs/ML0501/ML050110277.pdf. Some of these isotopes—strontium-90 and cesium-137—have half-lives of about 30 years. But others "take much longer to decay." *Id.* One of these isotopes is plutonium-239, which "has a half-life of 24,000 years"—fifteen times that of radium-226. *Id.* There's no plausible argument that spent nuclear fuel, which contains radioactive isotopes with half-lives much longer than radium-226, is the type radioactive material contemplated in the disposal provision in § 2111(b).

So these provisions do not support the Commission's claim of authority. In response, the Commission and Interim Storage Partners, LLC point to two cases from sister circuits. Both are unpersuasive.

In *Bullcreek v. NRC*, the D.C. Circuit denied petitions for review of the Commission's Rulemaking Order and held that the Nuclear Waste Policy Act did "not repeal or supersede the [Commission]'s authority under the Atomic Energy Act to license private away-from-reactor storage facilities." 359 F.3d at 537-38. The D.C. Circuit essentially assumed that the Atomic Energy Act had granted the

Commission authority to license away-from-reactor storage facilities, despite explicitly recognizing that the Act "does not specifically refer to the storage or disposal of spent nuclear fuel." *Id.* at 538. Rather than focus on the text of the statute, it merely noted that "it has long been recognized that the [Atomic Energy Act] confers on the [Commission] authority to license and regulate the storage and disposal of such fuel." *Id.* But none of the cases the D.C. Circuit cited provide a textual analysis of the Atomic Energy Act and whether it allows away-from-reactor spent nuclear fuel storage. Each of those cases dealt with separate questions of preemption and the role of states in this scheme. *See generally Pac. Gas. & Elec. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983); *Jersey Cent. Power & Light Co. v. Twp. of Lacey*, 772 F.2d 1103 (3d Cir. 1985); *Illinois v. Gen. Elec. Co.*, 683 F.2d 206 (7th Cir. 1982). They are irrelevant to the question before us.

So the D.C. Circuit provided no textual basis for its assumption that the statute authorized the Commission to issue such licenses. *See id.* (discussing the Atomic Energy Act). *Bullcreek* may be correct that the Nuclear Waste Policy Act didn't repeal portions of the Atomic Energy Act since "repeals by implication are not favored," but it doesn't actually address what authority the Commission had under the Atomic Energy Act. *Morton v. Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).

The other case the Commission cites—*Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004)—is just as unhelpful. It merely relies

on *Bullcreek* to "not revisit the issues surrounding the [Commission]'s authority to license away-from-reactor [spent nuclear fuel] storage facilities." *Skull Valley*, 376 F.3d at 1232. It too assumes the Commission's authority without analyzing the statute.

B.

Moreover, the Commission's argument cannot be reconciled with the Nuclear Waste Policy Act.

Spent nuclear fuel wasn't a concern in the 1940s and 1950s when the Atomic Energy Act was passed and amended. "Prior to the late 1970's, private utilities operating nuclear reactors were largely unconcerned with the storage of spent nuclear fuel." *Idaho*, 945 F.2d at 298. "It was accepted that spent fuel would be reprocessed." *Id.* "In the mid-70's, however, the private reprocessing industry collapsed for both economic and regulatory reasons." *Id.* "As a consequence, the nuclear industry was confronted with an unanticipated accumulation of spent nuclear fuel, inadequate private facilities for the storage of the spent fuel, and no long term plans for managing nuclear waste." *Id. See also* BRC Report at 20 (noting these problems and describing passage of the Act as "mark[ing] the beginning of a new chapter in U.S. efforts to deal with the nuclear waste issue"). This led Congress to pass the Nuclear Waste Policy Act in 1982.

The Nuclear Waste Policy Act provides a comprehensive scheme to address the accumulation of nuclear waste. Congress recognized that "Federal efforts during the

[prior] 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal ha[d] not been adequate" and that "State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel." 42 U.S.C. § 10131(a)(3), (6). "The Act made the federal government responsible for permanently disposing of spent nuclear fuel and high-level radioactive waste produced by civilian nuclear power generation and defense activities." *Nat'l Ass'n of Regul. Util. Comm'rs v. DOE*, 680 F.3d 819, 821, 401 U.S. App. D.C. 15 (D.C. Cir. 2012). *See also* 42 U.S.C. § 10131(a)(4) ("[T]he Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment.").

The Act also tasked the Department of Energy with establishing "a repository deep underground within a rock formation where the waste would be placed, permanently stored, and isolated from human contact." *Nat'l Ass'n of Regul. Util Comm'rs*, 680 F.3d at 821. *See also* 42 U.S.C. §§ 10133-34 (tasking the Energy Secretary with site characterization and public hearing duties related to the Yucca Mountain site selection). Yucca Mountain was chosen as the only suitable site for the repository when the Act was amended in 1987. *See* 42 U.S.C. § 10172 (selection of Yucca Mountain site). But the project stalled, even though the Nuclear Waste Policy Act "is obviously designed to prevent the Department [of Energy] from delaying the construction of Yucca Mountain as the permanent facility

while using temporary facilities." *Nat'l Ass'n of Regul. Util. Comm'rs v. DOE*, 736 F.3d 517, 519, 407 U.S. App. D.C. 197 (D.C. Cir. 2013) (citing 42 U.S.C. § 10168(d)(1)).

In addition to the establishment of the permanent repository, *see* 42 U.S.C. §§ 10131-10145, the Nuclear Waste Policy Act also established other measures to deal with spent nuclear fuel.[4]

One is temporary storage. *See id.* §§ 10151-10157. The Act places "primary responsibility for providing interim storage of spent nuclear fuel" on "the persons owning and operating civilian nuclear power reactors." *Id.* § 10151(a)(1). It tasks the Commission and the Secretary of Energy to "take such actions as . . . necessary to encourage and expedite the effective use of available storage, and the necessary additional storage, *at the site* of each civilian nuclear power reactor." *Id.* § 10152 (emphasis added). *See also id.* § 10153 ("The establishment of such procedures shall not preclude the licensing . . . of any technology for the storage of civilian spent nuclear fuel *at the site* of any civilian nuclear power reactor.") (emphasis added). It further tasks the Secretary of Energy with "provid[ing] . . . capacity for the storage of spent nuclear fuel from civilian nuclear power reactors." *Id.* § 10155(a)(1). Moreover, the Act provides that "the Federal Government has the

4. All these measures are subject to the proviso in 42 U.S.C. § 10155(h), which states that "nothing in this chapter shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on" the date of enactment.

responsibility to provide . . . not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity" where it is necessary for the "continued, orderly operation of such reactors." *Id.* § 10151(a)(3). Moreover, the Act provides that "the Federal Government has the responsibility to provide . . . not more than 1,900 metric tons of capacity for interim storage of spent nuclear fuel for civilian nuclear power reactors that cannot reasonably provide adequate storage capacity" where it is necessary for the "continued, orderly operation of such reactors." *Id.* § 10151(a)(3). Here, the license permits storage of at least 5,000 and as much as 40,000 metric tons of nuclear waste.

The other measure is monitored retrievable storage. *See id.* § 10161-10169. *See also id.* § 10101(34) (defining "monitored retrievable storage facility"). Under the statute, "[t]he Secretary [of Energy] is authorized to site, construct, and operate one monitored retrievable storage facility subject to the conditions described [in the relevant sections of statute]." *Id.* § 10162(b). And one of those conditions is that "[a]ny license issued by the Commission for a monitored retrievable storage facility under [the statute] shall provide that . . . construction of such facility may not begin until the Commission has issued a license for the construction of a repository [i.e., Yucca Mountain]." *Id.* § 10168(d)(1).

Reading these provisions together makes clear that the Nuclear Waste Policy Act creates a comprehensive statutory scheme for addressing spent nuclear fuel

accumulation. The scheme prioritizes construction of the permanent repository and limits temporary storage to private at-the-reactor storage or at federal sites. It plainly contemplates that, until there's a permanent repository, spent nuclear fuel is to be stored onsite at-the-reactor or in a federal facility.

In sum, the Atomic Energy Act doesn't authorize the Commission to license a private, away-from-reactor storage facility for spent nuclear fuel. And the Nuclear Waste Policy Act doesn't permit it. Accordingly, we hold that the Commission doesn't have authority to issue the license challenged here.

When read alongside each other, we find these statutes unambiguous. And even if the statutes were ambiguous, the Commission's interpretation wouldn't be entitled to deference.

Last year, the Supreme Court directed that, "[w]here the statute at issue is one that confers authority upon an administrative agency, that inquiry must be shaped, at least in some measure, by the nature of the question presented—whether Congress in fact meant to confer the power the agency has asserted" and whether there are "reason[s] to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 142 S. Ct. 2587, 2607-08, 213 L. Ed. 2d 896 (2022) (quotations omitted) (adopting the major questions doctrine).

Disposal of nuclear waste is an issue of great "economic and political significance." *Id.* at 2608. What to do with the

nation's ever-growing accumulation of nuclear waste is a major question that—as the history of the Yucca Mountain repository shows—has been hotly politically contested for over a half century. Congress itself has acknowledged that "high-level radioactive waste and spent nuclear fuel have become major subjects of public concern." 42 U.S.C. § 10131(a)(7) (findings section of the Nuclear Waste Policy Act). "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to *clear* delegation from that representative body." *West Virginia*, 142 S. Ct. at 2616 (emphasis added). Here, there's no such clear delegation under the Atomic Energy Act. And the Nuclear Waste Policy Act belies the Commission's arguments to the contrary.

* * *

We grant the petitions for review, vacate the license, and deny the Commission's motions to dismiss.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MARCH 14, 2024

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-60743

STATE OF TEXAS; GREG ABBOTT, GOVERNOR OF THE STATE OF TEXAS; TEXAS COMMISSION ON ENVIRONMENTAL QUALITY; FASKEN LAND AND MINERALS, LIMITED; PERMIAN BASIN LAND AND ROYALTY OWNERS,

Petitioners,

versus

NUCLEAR REGULATORY COMMISSION; UNITED STATES OF AMERICA,

Respondents.

March 14, 2024, Filed

Appeal from the Nuclear Regulatory Commission. Agency No. 72-1050.

Appendix C

ON PETITION FOR REHEARING EN BANC

Before JONES, HO, and WILSON, *Circuit Judges.*

PER CURIAM:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. 35, 36 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

In the en banc poll, seven judges voted in favor of rehearing en banc (Stewart, Southwick, Graves, Higginson, Willett, Douglas, and Ramirez), and nine voted against rehearing en banc (Richman, Jones, Smith, Elrod, Haynes, Ho, Duncan, Engelhardt, and Wilson).

Judge Oldham is recused and did not participate in the poll.

Appendix C

EDITH H. JONES, *Circuit Judge*, joined by SMITH, ELROD, HO, ENGELHARDT, and WILSON, *Circuit Judges*, concurring in the denial of rehearing en banc:

The panel previously identified two bases of authority to review the NRC's proposed action to redirect the storage of nuclear energy waste away from Yucca Mountain, in conflict with federal law: these petitioners are parties aggrieved, and the NRC has acted *ultra vires*. The dissent challenges both grounds of jurisdiction. We continue to adhere to our position that the judiciary has not only the authority but the duty to review the NRC's actions, which may threaten significant environmental damage in the Permian Basin, one of the largest fossil fuel deposits in the world.

1. "Party Aggrieved"

Who has the ability to secure judicial review of this particular licensing decision? There's no question of Article III standing for the petitioners. Also, there's no question that Fasken (shorthand for petitioning mineral operators and landowners neighboring the proposed storage site) is "aggrieved." Nor that the state of Texas, which submitted comments and later passed a law prohibiting such storage, is "aggrieved." The argument is made that under Section 2344 of the Hobbs Act, "parties aggrieved" who may seek judicial review means only those whom the agency permitted to intervene in the licensing proceeding. But here, Fasken's multiple attempts formally to intervene were repeatedly rebuffed by the agency. *See Texas v. NRC* 78 F.4th 827, 834. If this argument is accepted, in other

words, the NRC controls the courthouse door through its authority to determine who may be "parties" to licensing proceedings. And the state of Texas, which didn't formally attempt to intervene but made its position plainly known to NRC, has no access to judicial review at all.

The question of our jurisdiction is therefore bound up with fundamental principles governing review of agency decisions. Specifically, the courts default in our duty to "say what the law is" (i.e., *Marbury v Madison*, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)) if we enable the agency to be the unilateral "decider" of the statutory term "party aggrieved." *Massachusetts v. NRC*, 878 F.2d 1516, 1520 (1st Cir. 1989). Our duty is reinforced by the oft-stated "strong presumption" that a statute should be read in a way that accords with the "basic[] principle" that agency actions are "subject to judicial review." *Guerrero-Lasparilla v. Barr*, 140 S. Ct. 1062, 1069 (2020); *Bowen v. Mich. Acad. Of Family Physicians*, 476 U.S. 667, 670, 106 S. Ct. 2133, 2135, 90 L. Ed. 2d 623 (1986) (noting "the strong presumption that Congress intends judicial review of administrative action"); *Kirby Corp. v. Pena*, 109 F.3d 258, 261 (5th Cir. 1997) ("There is a 'strong presumption' that Congress intends there to be judicial review of administrative agency action, . . . and the government bears a 'heavy burden' when arguing that Congress meant to prohibit all judicial review") (citations omitted)); *Dart v. United States*, 848 F.2d 217, 221, 270 U.S. App. D.C. 160 (D.C. Cir. 1988) ("If the wording of a preclusion clause is less than absolute, . . . [j]udicial review is favored when an agency is charged with acting beyond its authority."). A holding that courts cannot decide who are aggrieved parties according to the statutory language is not only

contrary to these principles but also seems particularly unlikely in a legal world where deference to agency interpretations of law, e.g., in *Auer* and *Chevron*, is under increasing scrutiny.

The contrary position of judicial abdication rests on a provision of the Atomic Energy Act that allegedly constitutes "the only process" by which the [NRC] could make a "party": "[T]he Commission shall grant a hearing upon the request of *any person who may be affected* by the proceeding, and *shall admit any such person* as a party to such proceeding." 42 U.S.C. § 2239(a)(1)(A) (emphasis added). Given the breadth of NRC's statutory charge to allow "affected persons" to be made "parties," it seems paradoxical to resort to the Hobbs Act to disable Fasken and Texas from judicial review by agency fiat. More specifically, with respect to the NRC's proffered interpretation, there are two responses. First, the D.C. Circuit has interpreted the term "parties aggrieved" more broadly than simply those who were joined as formal parties by the agency to administrative proceedings. Second, to the extent a couple of courts have rigidly used the term "parties" to mean only those formally admitted in agency proceedings, those decisions are either distinguishable or wrong.

With a couple of exceptions noted below, the term "party aggrieved" for judicial review purposes has been interpreted flexibly by the D.C. Circuit itself. Beginning with *Simmons v. ICC*, 716 F.2d 40, 42, 230 U.S. App. D.C. 236 (D.C. Cir. 1983), then-judge Scalia laid the groundwork for interpreting that phrase as he held that "party aggrieved" means more than "person aggrieved" for

purposes of Administrative Procedure Act judicial review.[1] 5 U.S.C. § 702 ("A *person* suffering legal wrong because of agency action, or adversely affected or *aggrieved* by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." (emphasis added)). We don't dispute that terminological distinction. But shortly afterward, the D.C. Circuit held that "party aggrieved" under the Hobbs Act must be interpreted flexibly in light of the nature of the administrative proceeding. *Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1192 (D.C. Cir. 1987); *see also ACA Int'l v. Fed. Communications Comm'n*, 885 F.3d 687, 711, 435 U.S. App. D.C. 1 (D.C. Cir. 2018); *Reyblatt v NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997) (submitting comments in a rulemaking proceeding confers "party" status for Hobbs Act purposes). The court held in *Water Transp.* that the "degree of participation necessary to achieve party status varies according to the formality with which the proceeding was conducted." 819 F.2d at 1192.

Decisions from other courts concur. *See Nat'l Ass'n Of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1250 (11th Cir. 2006) (holding that entities "participated in the proceedings" and "independently established their status as 'party aggrieved' by "submitting comments and notice of ex parte communications"), *opinion modified on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006); *Clark & Reid Co., Inc. v. United States*, 804 F.2d 3, 6 (1st Cir.

1. Judge Scalia cites this court's decision in *American Trucking Associations, Inc. v. ICC*, 673 F.2d 82, 84 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1272 (1983), as being in accord with the "party" requirement. We don't dispute this either.

1986) ("[W]e do not equate the regulatory definition of a 'party' in an ICC proceeding with the participatory party status required for judicial review under the Hobbs Act"); *Am. Civil Liberties Union v. FCC*, 774 F.2d 24, 26 (1st Cir. 1985) (observing that entities could have "participate[d] in the proceedings or review process as individual parties" if they had "filed comments with the agency or petitioned for reconsideration of the FCC's final order"). Another indicium of the necessity for a practical judicial interpretation of this term arises from the fact that the Hobbs Act covers several quite different agencies and several types of proceedings: rulemaking, adjudication, and licensing. What makes for "party aggrieved" should be consistently interpreted and not left to the varying rules of practice of each agency for each type of proceeding.

Simmons itself supports finding that Fasken and Texas are each a "party aggrieved." *Simmons* was a challenge to an ICC ratemaking proceeding, and the court held that Simmons, who had participated "by submitting comments" in another aspect of the proceeding (the "railroad docket") could not be a "party aggrieved" as to the "motor carrier docket" aspect in which it had filed nothing. *Simmons*, 716 F.2d at 42, 45. The court's analysis centered on whether to allow Simmons to challenge the outcome of that part of the proceeding where it hadn't submitted any comments at all. That Simmons had standing under the Hobbs Act to challenge the deregulatory rule on the railroad docket—by virtue of filing comments—was uncontested. By analogy here, Fasken "participated" in the proceeding with comments, submissions, attendance at hearings, and factual submissions. And the state of Texas "participated" by filing comments that made its position

plain. Indeed, NRC acknowledged the state's position in its final environmental impact statement. 85 Fed. Reg. 27,447, 27,448 (May 8, 2020). The agency became well aware of the petitioners' concerns. Under *Water Transp.* and its progeny, Fasken and Texas should qualify for "party aggrieved" status.

Going back to the courts' presumption of judicial review of agency action, the presumption may be overcome "only on a showing of clear and convincing evidence of a contrary legislative intent." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141, 87 S. Ct. 1507, 1511, 18 L. Ed. 2d 681 (1967); *Traynor v. Turnage*, 485 U.S. 535, 542, 108 S. Ct. 1372, 1378, 99 L. Ed. 2d 618 (1988); *see also Rhode Is. Dept. of Env. Mgmt. v. United States*, 304 F.3d 31, 41-42 (1st Cir. 2002). As the First Circuit also pointed out, requiring intervention for "party aggrieved" status is "circular...[t]he NRC cannot now claim that by refusing to grant the Commonwealth's requests to become a party, the NRC's decisions are beyond review." *Massachusetts*, 878 F.2d at 1520.

We acknowledge that the D.C. Circuit and Tenth Circuit have counterintuitively adopted NRC's circular position.[2] This panel's position, however, relies on the above citations from the D.C. Circuit and other courts.

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2. *See, e.g., Ohio Nuclear-Free Network v. NRC*, 53 F.4th 236, 239, 459 U.S. App. D.C. 266 (D.C. Cir. 2022); *NRDC v NRC*, 823 F.3d 641, 643, 422 U.S. App. D.C. 325 (D.C. Cir. 2016); *State ex rel. Balderas v NRC*, 59 F.4th 1112, 1117 (10th Cir. 2023). In *Balderas*, the court denied review to New Mexico, which had submitted comments only on the environmental impact statement issued after the licensure. That decision is distinguishable at least from Fasken's position.

The bottom line for Hobbs Act "party aggrieved" status is to participate in agency proceedings, which both Fasken and Texas did; federal courts should not be bound to defer to varying agency rules and procedures to interpret this singular statutory language—whose purpose after all is to facilitate judicial review. NRC admits that the panel correctly noted judicial consensus that the "degree of participation necessary to achieve party status varies according to the formality with which the proceeding is conducted." Federal Respondents' Pet. for Reh'g En Banc at 7. Consequently, according to the nature of the proceedings, the *fact* and *scope* of the petitioner's "participation" should be determinative for judicial review, not the NRC's denial of "participation" to Fasken. NRC's insistence on strict compliance with its intervention rules is rather bold, not only from the standpoint of eliminating judicial review, but also because NRC quotes the statute that the Commission "*shall* admit any such person as a party..." *Id.*

And to the point that this decision has "created" a circuit conflict, we disagree in part. These petitioners satisfy "party aggrieved" status under the numerous cases that apply a broader standard of "participation." There is no circuit conflict with such cases. The conflict here is with the *Balderas* decision's denial of New Mexico's standing to challenge the ISP license. Inasmuch as the conflict is about statutory standing to appeal, a finding of standing means that our court will perform its duty of judicial review.

In light of the split of authorities, is "party aggrieved" status an issue of overarching significance? Not at all. The Hobbs Act jurisdictional provision is rarely debated, as anyone trying to research this term will quickly ascertain.

This is likely for a couple of reasons. First, much agency activity covered by the Hobbs Act is conducted in a closed circle of experts, lobbyists and lawyers well familiar with the rules and proclivities of the administrators; therefore, arguments over statutory standing seldom arise. Second, with "participation" as the bottom line from a judicial standpoint,[3] which is also the baseline of D.C. court opinions (albeit with varying applications of the term), substantive judicial review occurs only where "parties" have actually "participated" in the challenged proceedings. Fasken and Texas were no strangers to NRC here. Indeed, the NWPA specifically required "consultation" with the states before siting of spent nuclear fuel may occur anywhere.[4] That provision as well should have garnered Texas "party aggrieved" status.

For these reasons, the panel decision is comfortably footed on statutory standing under the Hobbs Act.

2. The *Ultra Vires* Exception to the "Party Aggrieved" Requirement

Even if Texas and Fasken were not "parties aggrieved" under the Hobbs Act, the panel nevertheless

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3. D.C. court opinions also reasonably foreclose *de minimis* participation as a basis for Hobbs Act judicial review. *See ACA Int'l*, 885 F.3d at 711; *Water Transp. Ass'n*, 819 F.2d at 1192-93.

4. 42 U.S.C. § 10155(d)(1)-(2) requires the Department of Energy to exercise very limited interim storage of spent nuclear fuel through "a cooperative agreement under which [the] *State... shall have the right* to participate in a process of consultation and cooperation")(emphasis added). Needless to say, no such consultation or cooperation occurred here.

had jurisdiction to hear their appeal. As explained in the opinion, this court has long recognized an exception to the "party aggrieved" requirement regarding challenges to the lawfulness of the agency's action. Texas and Fasken each argued that the NRC's actions were unauthorized either by the AEA or the NWPA. *Texas*, 78 F.4th at 839-40. Accordingly, the panel relied on the rule that "a person may appeal an agency action even if not a party to the original agency proceeding . . . if the agency action is attacked as exceeding [its] power" or if the appellant "challenges the constitutionality of the statute conferring authority on the agency." *Am. Trucking Associations, Inc. v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982); *accord Wales Transp., Inc. v. ICC*, 728 F.2d 774, 776 n.1 (5th Cir. 1984).

Texas and Fasken challenged the lawfulness of the NRC's actions and the legality of the NRC's conduct. But this court's exception to the "party-aggrieved" requirement is criticized as a relic of ages past that perished in the early 1980s. Of course, the Supreme Court has not overruled our *ultra vires* exception, and this court has recognized its existence in at least two more recent cases. *See Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228, 238 n.24 (5th Cir. 2005) (noting other courts' disagreement); *Merchants Fast Motor Lines, Inc. v. ICC*, 5 F.3d 911, 922 (5th Cir. 1993).[5]

5. To be sure, other courts have rejected applying *ultra vires* review in cases involving the Hobbs Act. *See Balderas*, 59 F.4th at 1123-24; *Nat'l Ass'n Of State Util. Consumer Advocates*, 457 F.3d at 1249; *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 167 F.3d 111, 112-13 (2d Cir. 1999); *Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 799 F.2d 317, 334-35 (7th Cir. 1986).

Appendix C

Three reasons are posited to overrule *ultra vires* jurisdiction to review the statutory or constitutional basis for agency actions. First, it is contended that our court decisions crafted the rule based on cases that predate Congress's bringing the ICC within the ambit of the Hobbs Act. That is just wrong. *Wales* and *American Trucking* both postdate Hobbs Act review of ICC actions *and* cite the Hobbs Act. There is no ground to attribute our courts' decisions to judicial mistakes, and consequently, *Wales* and *American Trucking* can be reconciled as to both holdings.

Second, this court's *ultra vires* exception was not made out of whole cloth. A similar rule is acknowledged by the Supreme Court, this court, and our sister circuits in various contexts. *See, e.g., Leedom v. Kyne*, 358 U.S. 184, 190, 79 S. Ct. 180, 185, 3 L. Ed. 2d 210 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.");[6] *Kirby Corp.*, 109 F.3d at 269 (acknowledging "judicial review is proper under the rule set forth in *Kyne*, despite there being a statutory provision prohibiting such review, because the agency's challenged action is so contrary to the terms of the relevant statute that it necessitates judicial review independent of the review provisions of the relevant statute"); *see also,*

6. The parties did not cite *Leedom*, and I agree that the Supreme Court clarified its application in *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 112 S. Ct. 459, 116 L. Ed. 2d 358 (1991). Nonetheless, *Leedom* represents the principle that the Article III courts are not totally closed to plaintiffs who claim agency action has violated the agency's statutory mandate or the Constitution.

e.g., Long Term Care Partners, LLC v. United States, 516 F.3d 225, 233 (4th Cir. 2008) (recognizing there is "a nonstatutory exception to the [APA] § 704 finality requirement in cases in which agencies act outside the scope of their delegated powers and contrary to 'clear and mandatory' statutory prohibitions"); *Rhode Island Dep't of Envtl. Mgmt.*, 304 F.3d at 42 ("[E]ven after the passage of the APA, some residuum of power remains with the district court to review agency action that is *ultra vires*."); *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1330-31, 316 U.S. App. D.C. 61 (D.C. Cir. 1996) ("The procurement power must be exercised consistently with the structure and purposes of the statute that delegates that power . . . . It does not follow, then, that the President's broad authority under the Procurement Act precludes judicial review of executive action for conformity with that statute—let alone review to determine whether that action violates another statute." (citation and quotations omitted)). Courts apply this exception for good reason. Indeed, "[w]ere such unauthorized [agency] actions to go unchecked, chaos would plainly result." *Dart*, 848 F.2d at 224. Thus, "[w]hen an executive acts *ultra vires*, courts are normally available to reestablish the limits on his authority." *Id.*

Third, two additional misconceptions should be dispelled. The first is that the *ultra vires* exception means no more than that an agency "got it wrong" per APA standards. *See Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 799 F.2d 317, 334-35 (7th Cir. 1986). That is plainly not what *Wales* and *American Trucking* stand for. Instead, and as the above cases demonstrate,

the term literally refers to being "outside" the agency's power, *i.e.*, in defiance of the limits placed by Congress in the agency's governing statute or the Constitution. None of the cases cited above have misunderstood this term or misapplied the rule to challenges involving less than an absence of statutory or constitutional authority. The "got it wrong" criticism is misleading hyperbole. Second, we need not speculate about any limits on who can challenge agency action as *ultra vires*, because in this case there is no doubt whatsoever about the petitioners' Article III standing. Nor is there doubt that NRC's rejection of "party aggrieved" status, if that were to be decided, has denied them any other avenue of redress.

If ever there were a case in which an agency acted *ultra vires*, it should be this case. And these petitioners should have Hobbs Act standing to contest the NRC's illegal licensing.

Appendix C

STEPHEN A. HIGGINSON, *Circuit Judge*, joined by GRAVES, DOUGLAS, and RAMIREZ, *Circuit Judges*, dissenting from denial of rehearing en banc:

To hold that the Nuclear Regulatory Commission lacked authority to license private, away-from-reactor storage of spent nuclear fuel without a clear delegation from Congress, the panel disregarded a clear limitation that Congress imposed on our own authority.

Through the Hobbs Act, Congress provided for judicial review of a Nuclear Regulatory Commission "final order entered in any proceeding" under the Atomic Energy Act "for the granting, suspending, revoking, or amending of any license." 42 U.S.C. § 2239(b)(1), (a)(1)(A). But, like challenges to all agency actions governed by the Hobbs Act, Congress limited jurisdiction to where "[a]ny party aggrieved by the final order" seeks judicial review of the order. 28 U.S.C. § 2344. The panel erred when it ignored this limitation, deepening one circuit split that arose from our court's atextual dicta in a footnote over forty years ago and threatening to create another with new, troubling dicta of its own.

This exercise of jurisdiction has grave consequences for regulated entities' settled expectations and careful investments in costly, time-consuming agency proceedings, inviting spoilers to sidestep the avenues for participation that Congress carefully created to prevent this uncertainty. *See* Amicus Nuclear Energy Institute Br. 4-7. And it does so across a wide range of industries—including agriculture, transportation, development, and

communications—because the Hobbs Act's exclusive jurisdiction provision governs actions taken by many agencies. *See* 28 U.S.C. § 2342(1)-(7).

I.

This case concerns a license issued by the Commission to a private company, Interim Storage Partners, for operation of a temporary, away-from-reactor spent nuclear fuel storage facility in Andrews County, Texas. Two private entities—Permian Basin Land and Royalty Owners and for-profit oil and gas extraction organization Fasken Land and Minerals (collectively, "Fasken")—sought to intervene in the licensing proceeding but were denied. Their petitions for review in the D.C. Circuit of the orders denying intervention were either dismissed or denied. *Don't Waste Michigan v. NRC*, No. 21-1048, 2023 U.S. App. LEXIS 2022, 2023 WL 395030, at *1-3 (D.C. Cir. Jan. 25, 2023) (per curiam). Texas never sought to intervene in the licensing proceeding. Instead, it sent letters to the Commission both during a public comment period on a draft environmental impact statement performed on the license and after Texas passed a law prohibiting storage of spent nuclear fuel.

Fasken and Texas petitioned for review of the license in this court and licensee Interim Storage Partners intervened. Texas argued, as relevant here, that the license should be vacated because the Commission does not have the authority to license private entities for temporary, away-from-reactor storage of spent nuclear fuel. The panel concluded that it had jurisdiction under the

Hobbs Act, granted the petitions for review, and vacated the license. *Texas v. NRC*, 78 F.4th 827, 837-40, 844 (5th Cir. 2023).

The panel suggested that, while neither Fasken nor Texas were parties in the licensing proceeding that produced the challenged order, it may be that "participat[ion]—in some way—in the agency proceedings, which Texas did through comments and Fasken did by seeking intervention and filing contentions," was sufficient. *Id.* at 838. But the panel rested its assertion of jurisdiction on our court's "*ultra vires* exception to the party-aggrieved status requirement." *Id.* at 839. Under the exception, there are "'two rare instances' where a 'person may appeal an agency action even if not a party to the original agency proceeding'— (1) where 'the agency action is attacked as exceeding [its] power' and (2) where the person 'challenges the constitutionality of the statute conferring authority on the agency.'" *Id.* (quoting *Am. Trucking Ass'ns v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982) (per curiam)). The panel concluded that two of the challenges attacked the Commission as exceeding its power: Texas's argument that "the Commission lacks the statutory authority to license the facility" and Fasken's argument that "the Commission violated the National Environmental Policy Act and Administrative Procedure Act by allowing a licensing condition that violates the Nuclear Waste Policy Act." *Id.* at 839-40.

II.

Lest troubling dicta again be elevated to binding precedent without examination, I write first to explain

why the panel is wrong to suggest, without so holding, that Texas and Fasken might be "part[ies] aggrieved" under the plain text of the Hobbs Act. The panel intimates that requiring that a "party aggrieved" be a party to the underlying proceeding here would "impose an extra-textual gloss by requiring a degree of participation not contemplated in the plain text of the statute." *Id.* at 839. But giving effect to the words that Congress chose—and refusing to read in words that it did not choose—does no such thing.

The Hobbs Act's narrow, exclusive-jurisdiction provision limits review to those petitioners who are a "party aggrieved by the final order," 28 U.S.C. § 2344, in contrast with the broader judicial review provision of the Administrative Procedure Act under which a "person" "aggrieved by agency action" may petition for review, 5 U.S.C. § 702. I don't disagree that party status, because the Hobbs Act encompasses a variety of agency actions, turns on the nature of the agency proceedings. But in these proceedings the answer is clear. With the Atomic Energy Act, Congress carefully delineated the only process by which the Commission could make a "person" a "party" in the licensing proceeding context: "[T]he Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a)(1)(A).[7] Where the Commission denies a

7. Indeed, Congress relied on the "person" versus "party" distinction throughout the Atomic Energy Act. For example, after the conclusion of certain licensing proceedings for the construction of plants, the Commission must publish a notice of intended operation before fuel is loaded into the plant so that "any person whose interest

person's attempt to become a *party*—that is, where the Commission denies intervention—Congress provided for judicial review of that denial under the Hobbs Act. *Id.* § 2239(b)(1). Pursuant to this congressionally devised process, Fasken sought to become a party to the proceeding and, when the Commission denied intervention, obtained full review of that denial in the D.C. Circuit. *Don't Waste Michigan*, 2023 U.S. App. LEXIS 2022, 2023 WL 395030, at *1-3. Texas never sought to become a party.

Without the answer that Congress supplied, the panel relied on what it guessed Congress intended as "the function of the 'party aggrieved' status requirement." *NRC*, 78 F.4th at 838. This put the panel in the more difficult position of attempting to discern what degree of participation in the agency proceeding was enough. *Id.* at 838-39. But no such inquiry is required here or even permitted because, in the context of Commission licensing proceedings, Congress has answered the question already.

III.

The panel rested its assertion of jurisdiction, with neither merits endorsement nor analysis, on this court's judge-made, *ultra vires* exception to Congress's jurisdictional limitation. *Id.* at 839-40. Because courts have "no authority to create equitable exceptions to

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may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether" the construction complies with the license. *Id.* § 2239(a)(1)(B)(i). This distinction made by Congress contemplates that a person may not be party to a licensing proceeding for a plant's construction but may later challenge whether subsequent construction complies with the license.

jurisdictional requirements," *Bowles v. Russell*, 551 U.S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), the exception should be eliminated.

This court, in dicta in a footnote over forty years ago, asserted that the Hobbs Act's "party aggrieved" requirement does not limit review where "the agency action is attacked as exceeding [its] power." *Am. Trucking Ass'ns*, 673 F.2d at 85 n.4 (internal quotation marks and citation omitted).[8] That assertion, though made in 1982, relied exclusively on Interstate Commerce Commission cases from 1968 and earlier—seven years before Congress brought judicial review of that body's orders within the ambit of the Hobbs Act. *See* Pub. L. No. 93-584, §§ 3, 4, 88 Stat. 1917 (1975). As the Second Circuit explained, the exception "rests upon" these "pre-1975 cases" "without any acknowledgment of the intervening change in governing procedure" and with "no compelling support for the proposition that, despite the plain statutory language to the contrary, such petitions remain valid today." *Erie-Niagara Rail Steering Comm. v. Surface. Transp. Bd.*, 167 F.3d 111, 112 (2d Cir. 1999) (per curiam).

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8. This was never explained as an outgrowth of the much narrower exception that the Supreme Court recognized in *Leedom v. Kyne*, 358 U.S. 184, 190, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958). There, the Supreme Court explained that "the inference would be strong that Congress intended the statutory provisions governing . . . general jurisdiction . . . to control" where "there is no other means" to "protect and enforce" a "right" that Congress has created. *Id.* (internal quotation marks and citations omitted). But the Court has underscored that this narrow exception does not apply where there is a "meaningful and adequate opportunity for judicial review." *Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43, 112 S. Ct. 459, 116 L. Ed. 2d 358 (1991). Nor does it apply where Congress has spoken "clearly and directly" to judicial review. *Id.* at 44.

No other circuit has adopted our court's exception to the Hobbs Act, and four circuits have rejected it. *Balderas v. NRC*, 59 F. 4th 1112, 1123-24 (10th Cir. 2023); *Nat'l Ass'n of State Util. Consumer Advocs. v. FCC*, 457 F.3d 1238, 1249 (11th Cir. 2006) (Pryor, J.), *modified on other grounds on denial of reh'g*, 468 F.3d 1272 (11th Cir. 2006); *Erie-Niagara Rail Steering Comm.*, 167 F.3d at 112-13; *In re Chicago, Milwaukee, St. Paul & Pac. R.R.*, 799 F.2d 317, 334-35 (7th Cir. 1986) (Easterbrook, J.). Indeed, the Tenth Circuit in *Balderas* rejected the exception when New Mexico invoked it to challenge the same license at issue here. 59 F. 4th at 1123-24. In the Seventh Circuit, Judge Easterbrook explained that our court's atextual exception reads out the "party" limitation that Congress imposed because "'exceeding the power' of the agency may be a synonym for 'wrong,' so that the statute then precludes review only when there is no reason for review anyway." *In re Chicago*, 799 F.2d at 335.

Parsing which merits arguments here fall under our court's *ultra vires* exception shows its unworkability—and the risk for judicial aggrandizement when courts can pick and choose when to abide by Congress's limits. The panel concluded that it had jurisdiction over Fasken's argument that "the Commission violated the National Environmental Policy Act and Administrative Procedure Act by allowing a licensing condition that violates the Nuclear Waste Policy Act" because the argument "centers on the contention that the Commission acted beyond its statutory authority by issuing a license with a condition expressly prohibited by the Nuclear Waste Policy Act." *NRC*, 78 F.4th at 840. But this asks judges to speculate about what a petitioner's challenges are *really* about to decide whether Congress's clear jurisdictional limitation on their power to hear cases *really* applies.

The panel concluded that it had jurisdiction over Texas's argument that "the Commission lacks the statutory authority to license the facility" because that argument "attacks the Commission for licensing a facility without the authority to do so under the Atomic Energy Act, and in conflict with the Nuclear Waste Policy Act." *Id.* at 839-40. The panel, however, determined that it lacked jurisdiction over Texas's arguments that "the license issuance violated the Administrative Procedure Act" (unlike, inexplicably, Fasken's Administrative Procedure Act challenge) and the "National Environmental Policy Act by failing to assess the risks of a potential terrorist attack." *Id.* But why are these latter two not also "attack[s]" on the "agency action" as "exceeding [its] power"? *Am. Trucking Ass'ns*, 673 F.2d at 85 n.4. An agency exceeds its power whenever it violates the law. That includes when, for example, its action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Our exception reads out the difference, discussed above, that Congress created between broader judicial review under the Administrative Procedure Act and narrower judicial review under the Hobbs Act. And "[t]he merits of that policy are for the Congress rather than us to determine." *Simmons v. Interstate Commerce Comm'n*, 716 F.2d 40, 43, 230 U.S. App. D.C. 236 (D.C. Cir. 1983) (Scalia, J.).

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For these reasons, I respectfully dissent from denial of rehearing en banc.

APPENDIX D — MEMORANDUM AND ORDER OF THE NUCLEAR REGULATORY COMMISSION, FILED APRIL 23, 2020

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF HOLTEC INTERNATIONAL
(HI-STORE Consolidated Interim Storage Facility)

CLI-20-4
Docket No. 72-1051-ISFSI

April 23, 2020

COMMISSIONERS: Kristine L. Svinicki, Chairman; Jeff Baran; Annie Caputo; David A. Wright

MEMORANDUM AND ORDER

Today we address five separate appeals of the Atomic Safety and Licensing Board's denial of requests to intervene in the proceeding regarding Holtec International's application to construct and operate a consolidated interim storage facility (CISF) in Lea County, New Mexico.[1] For the reasons described below, we affirm the Board in part and reverse and remand in part. We also remand to the Board two contentions filed after the deadline.

1. *See* LBP-19-4, 89 NRC 353 (2019).

Appendix D

I. BACKGROUND

Holtec submitted its license application in March 2017.[2] The proposed license would allow Holtec to store up to 8680 metric tons of uranium (MTUs) (500 loaded canisters) in the Holtec HI-STORE CISF for a period of forty years.[3] Holtec's safety analysis currently encompasses only the canisters and contents approved under the generic docket 72-1040 for the HI-STORM UMAX canister storage system.[4] According to its application, Holtec plans up to nineteen subsequent expansion phases over the course of twenty years, with each expansion requiring a license amendment.[5] Holtec's environmental report (ER) anticipates operation of its proposed facility for up to 120 years (a forty-year initial licensing period plus eighty

2. *See* Letter from Kimberly Manzione, Holtec International, to Michael Layton, NRC (Mar. 30, 2017) (enclosing application documents including safety analysis report and environmental report) (ADAMS accession no. ML17115A431 (package)). By the time the Board ruled, Holtec had updated its application documents. The application revisions referenced in the Board's decision are: Environmental Report on the Holtec International HI-STORE CIS Facility, rev. 5 (Mar. 2019) (ML19095B800) (ER); and Holtec, Licensing Report on the HI-STORE CIS Facility, rev. 0F (Jan. 31, 2019) (ML19052A379) (SAR). References in this decision refer to the same revisions unless otherwise noted.

3. *See* Proposed License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste SNM-1051, at 1 (ML17310A223) (Proposed License).

4. SAR § 1.0 at 1-2; *see* 10 C.F.R. § 72.214 (list of approved spent fuel storage casks).

5. *See* ER § 1.0.

years of potential renewal periods) with up to 100,000 MTUs stored after all expansions.[6]

The Staff published a notice of opportunity to request a hearing on Holtec's application in July 2018.[7] Petitions to intervene were filed by Sierra Club; Beyond Nuclear, Inc. (Beyond Nuclear); Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken); Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Studies Group (together, Joint Petitioners); Alliance for Environmental Strategies (AFES); and NAC International Inc. (NAC). The Board heard oral argument on January 23 and 24, 2019.

The Board rejected all the hearing requests for either lack of standing, failure to offer an admissible contention, or both. The Board found that three petitioners—Beyond Nuclear, Sierra Club, and Fasken—had demonstrated standing but had not offered an admissible contention.[8] The Board concluded that Joint Petitioners and NAC had neither demonstrated standing nor offered an admissible

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6. *Id.*

7. *See* Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

8. *See* LBP-19-4, 89 NRC at 358.

contention.[9] The Board did not rule on AFES's standing—which it found to be a close call—but rejected AFES's petition because the organization had not proposed an admissible contention.[10]

All petitioners except for NAC have appealed. The Staff and Holtec oppose the appeals, as described below.

II. DISCUSSION

A. Standard of Review

Our regulations allow a petitioner whose hearing request has been wholly denied to appeal as of right.[11] We generally defer to the Board on matters of contention admissibility and standing unless an appeal demonstrates an error of law or abuse of discretion.[12] Similarly, we generally defer to the Board on questions pertaining to the sufficiency of factual support for the admission of a contention.[13]

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9. *Id.*

10. *Id.* at 358, 370-71.

11. 10 C.F.R. § 2.311(c).

12. *See, e.g.*, *Crow Butte Resources, Inc.* (Marsland Expansion Area), CLI-14-2, 79 NRC 11, 13-14 (2014); *Strata Energy, Inc.* (Ross *In Situ* Uranium Recovery Project), CLI-12-12, 75 NRC 603, 608-13 (2012).

13. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-16-9, 83 NRC 472, 482 (2016); *Crow Butte*, CLI-14-2, 79 NRC at 13-14.

B. Beyond Nuclear/Sierra Club Contention 1/ Fasken

Beyond Nuclear and Fasken each proposed a single contention, and Sierra Club proposed its Contention 1, all questioning whether it is lawful to issue the proposed license at all.[14] These petitioners contend that the application must be rejected outright because it contemplates storage contracts with the U.S. Department of Energy (DOE) and such contracts would be illegal under the Nuclear Waste Policy Act (NWPA).[15] Holtec envisions

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14. *See* Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018), at 10-17 (Sierra Club Petition). Fasken entered this proceeding through a motion "to dismiss the licensing proceeding" filed directly before us relating to this facility and another CISF proposed in Texas. *See* Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility (Sept. 14, 2018). Beyond Nuclear filed a similar motion, which it attached as an exhibit to its hearing request and petition to intervene. *See* Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene (Sept. 14, 2018) (Beyond Nuclear Petition); Beyond Nuclear, Inc.'s Motion to Dismiss Licensing Proceedings for Hi-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility for Violation of the Nuclear Waste Policy Act (Sept. 14, 2018). Beyond Nuclear also submitted a letter after filing its appeal. *See* Letter from Mindy Goldstein and Dianne Curran, Counsel for Beyond Nuclear, to the Commissioners (Apr. 7, 2020). The letter does not affect our analysis below.

15. *See* Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §§ 10101-10270 (2012). Because our regulations do not provide for a "motion to dismiss" an application, the Secretary of the Commission referred Beyond Nuclear's and Fasken's motions to be considered

that its customers will either be nuclear plant operators or DOE, depending on which entity holds title to the spent nuclear fuel.[16]

Beyond Nuclear, Fasken, and Sierra Club all argued that it would violate the NWPA for DOE to take title to spent nuclear fuel before it builds a permanent geological repository. Section 123 of the NWPA provides that DOE will take title to the spent fuel when the Secretary of Energy accepts delivery of it.[17] Section 302 of the NWPA provides that the Secretary of Energy will enter contracts with the spent fuel generators (nuclear power plant owners) that "shall provide that" the Secretary will take title to the spent fuel "following commencement of operation of a repository."[18] And a ""repository" is defined in the NWPA as a system intended for "permanent deep geological disposal of high-level radioactive waste and spent nuclear fuel."[19]

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as hearing requests and as proposed contentions in each licensing proceeding. *See* Order of the Secretary (Oct. 29, 2018) (unpublished) (issued in this proceeding and in *Interim Storage Partners, LLC* (WCS Consolidated Interim Storage Facility)).

16. *See, e.g.*, Proposed License at 2, ¶ 17 ("[T]he construction program will be undertaken only after a definitive agreement with the prospective user/payer for storing the used fuel ([DOE] and/or a nuclear plant owner).").

17. 42 U.S.C. § 10143.

18. *Id.* § 10222(a)(5)(A).

19. *Id.* § 10101(18).

Appendix D

During oral argument on the petitions, Holtec's counsel acknowledged that the NWPA would prevent DOE from taking title to spent nuclear fuel and therefore (except for a relatively small quantity of waste it already owns) DOE could not be a CISF customer.[20] Holtec also acknowledged that it hopes Congress will change the law to allow DOE to enter into temporary storage contracts with Holtec.[21] But Holtec argued that because the application also contemplates that nuclear plant owners might be potential customers, the petitioners have not raised a litigable contention.

The Board rejected the argument that the "mere mention of DOE renders Holtec's license application unlawful."[22] The Board observed that Holtec "is committed to going forward with the project" by contracting directly with the plant owners.[23] The Board held that whether that option is ""commercially viable" was not an issue before the Board.[24] And it noted that Holtec had committed not

20. Tr. at 249-50.

21. Tr. at 248, 250.

22. LBP-19-4, 89 NRC at 381.

23. *Id.*

24. *Id.* (citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-49 (2001)). In *Hydro*, we observed that the NRC "is not in the business of regulating the market strategies of licensees." *Hydro*, CLI-01-4, 53 NRC at 48-49. In *Louisiana Energy Services*, we denied review of the Board's decision to reject a portion of a

to "contract unlawfully" with DOE.[25] The Board further pointed to DOE's publicly taken position that it cannot lawfully provide interim storage before a repository is operational.[26] The Board found that the NRC can safely assume that DOE would not enter unlawful contracts because federal agencies enjoy a "presumption of regularity" that they will "act properly in the absence of evidence to the contrary."[27] The Board concluded that Holtec "seeks a license that would allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future."[28]

Beyond Nuclear argues that the NRC cannot issue the proposed license because the Administrative Procedure Act prohibits agency action that is "not in accordance with the law" or "in excess of statutory jurisdiction, authority, or limitation."[29] Beyond Nuclear frames the question as

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contention that questioned the commercial viability of the proposed project, and we held that the license applicant did not have to "demonstrate the potential profitability of the proposed facility." *Louisiana Energy Services*, CLI-05-28, 62 NRC at 725.

25. *See* LBP-19-4, 89 NRC at 381.

26. *Id.* at 382.

27. *Id.* (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Chem. Found. Inc.*, 272 U.S. 1, 14-15 (1926)); *see also FCC v. Schrieber*, 381 U.S. 279, 296 (1965).

28. LBP-19-4, 89 NRC at 382.

29. Beyond Nuclear's Brief on Appeal of LBP-19-04 (June 3, 2019), at 7 (Beyond Nuclear Appeal) (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)).

whether the NRC "may approve a license application containing provisions that would violate NWPA if implemented."[30] Similarly, Sierra Club argues that "the Holtec project cannot be licensed if there is a possibility that the financial arrangements would be illegal."[31] Fasken argues that Holtec's license application is "outside of the ASLB's and the NRC's subject-matter jurisdiction" because approval would authorize a facility that violates the NWPA.[32] The Staff and Holtec oppose the appeals.[33]

The three appellants' characterization largely restates arguments already advanced to the Board.[34] As

30. *Id.*

31. Sierra Club's Petition for Review of Atomic Safety and Licensing Board Decision Denying Admissibility of Contentions in Licensing Proceeding (June 3, 2019), at 5 (Sierra Club Appeal).

32. Fasken and PBLRO Notice of Appeal and Petition for Review (June 3, 2019), at 3-4 (Fasken Appeal).

33. *See* NRC Staff Answer in Opposition to Beyond Nuclear's Appeal of LBP-19-4 (June 28, 2019); Holtec International's Brief in Opposition to Beyond Nuclear's Appeal of LBP-19-4 (June 28, 2019); NRC Staff Answer in Opposition to Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners' Appeal of LBP-19-4 (June 28, 2019); Holtec International's Brief in Opposition to Fasken and Permian Basin Land and Royalty Owners' Appeal of LBP-19-4 (June 28, 2019) (Holtec Opposition to Fasken Appeal); NRC Staff 's Answer in Opposition to the Sierra Club's Appeal of LBP-19-4 (June 28, 2019), at 5-7 (Staff Opposition to Sierra Club Appeal); Holtec International's Brief in Opposition to Sierra Club's Appeal of LBP-19-4 (June 28, 2019), at 6-9 (Holtec Opposition to Sierra Club Appeal).

34. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017)

the Board observed, "Holtec seeks a license that would allow it to enter into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future."[35] The proposed license would authorize Holtec to take possession of the spent nuclear fuel in its CISF; the license itself would not violate the NWPA by transferring the title to the fuel, nor would it authorize Holtec or DOE to enter into storage contracts.[36] Holtec and DOE acknowledge that it would be illegal under NWPA for DOE to take title to the spent nuclear fuel at this time, although Holtec states that it hopes that Congress will amend the NWPA in the future.[37] We disagree with the assertions that the license would violate the NWPA.[38] The NWPA does not prohibit

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(rejecting an appeal that only restated arguments previously raised before the board).

35. LBP-19-4, 89 NRC at 382.

36. *See* Proposed License at 2, ¶ 17.

37. *See* LBP-19-4, 89 NRC at 381-82.

38. To the extent Sierra Club argues that we should grant its appeal on Contention 1 because Holtec will use the license as "leverage to encourage Congress to change the law," we also reject that line of argument for the reasons discussed below in response to Sierra Club's appeal of Contention 26 and the Joint Petitioners' appeal of their Contention 14. Sierra Club Appeal at 9. Fasken suggests that the Secretary of the Commission improvidently referred its motion to dismiss to the Board for consideration as a legal contention. Fasken Appeal at 1-4. But our regulations do not provide for a motion to dismiss, and Fasken has not demonstrated how consideration of its arguments under our contention admissibility standards negatively impacted its position. In any event, the Board's finding that Holtec's application does not violate the NWPA addressed the gravamen of Fasken's motion to dismiss.

a nuclear power plant licensee from transferring spent nuclear fuel to another private entity. We therefore affirm the Board's decision to reject this contention.

C. Sierra Club Appeal

The Board found that Sierra Club had shown standing but that none of its twenty-nine proposed contentions were admissible. Sierra Club has now appealed with respect to ten of those contentions in addition to its Contention 1 discussed above.[39] On October 23, 2019, Sierra Club also moved to admit a new contention concerning transportation risks.[40]

1. Sierra Club Standing

As an initial matter, Holtec challenges the Board's finding that Sierra Club has standing in this proceeding.[41] Although in matters involving construction or operation of a nuclear power reactor we allow a "proximity presumption" of standing to persons living within fifty miles of the proposed site, in non-power reactor cases, standing is examined on a case-by-case basis considering the petitioner's proximity to the site in addition to other factors.[42] This "proximity-plus" standard takes into

39. Sierra Club Appeal at 5-7.

40. Sierra Club's Motion to File a New Late-Filed Contention (Oct. 23, 2019), (Sierra Club Motion for New Contention 30); Attach., Contention 30 (Sierra Club Contention 30).

41. Holtec Opposition to Sierra Club Appeal at 27-30.

42. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 71 NRC 111, 116-17 (1995).

account both the nature of the proposed activity and significance of the radioactive source.[43]

Sierra Club based its standing on declarations of its members who live and work near the proposed site.[44] The Board observed that one of Sierra Club's declarants, Daniel Berry, lives less than ten miles from the site and owns and operates a ranch just three miles away from the site.[45] Mr. Berry stated that he, his wife, and his ranch hands spend time every day traversing the ranch on foot, horseback, and ATV, while managing their cattle.[46]

The Board found that Sierra Club had established standing based on the proximity of its member Mr. Berry. It observed that the distances of his home and activities are "well within the limits that have been found to confer

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43. *Id.*

44. Sierra Club Petition at 6.

45. LBP-19-4, 89 NRC at 12-13. Mr. Berry submitted two declarations in this proceeding, one authorizing Sierra Club and the other authorizing Beyond Nuclear to represent his interest in this proceeding. Although the declaration submitted with the Sierra Club Petition stated that his home and ranch lie "less than 10 miles from the site," the declaration submitted with Beyond Nuclear's Petition was more detailed. In that declaration, Mr. Berry explained that his ranch, the T Over V ranch, consists of privately owned land and leased land, and he provided a map showing that a portion of the ranch lies about 3.2 miles away from the proposed CISF site. *See* Beyond Nuclear Petition, Attach. Ex. 2, Declaration of Daniel C. Berry III (Sept. 11, 2018) (Berry Beyond Nuclear Declaration).

46. Berry Beyond Nuclear Declaration ¶¶ 4-5.

standing to challenge much smaller storage facilities."[47] It rejected Holtec's argument that an individual "who lives sufficiently close to a potentially massive facility for storing much of the nation's spent nuclear fuel must first demonstrate with specificity how radiation might reach them."[48]

On appeal, Holtec claims that the Board erred by granting Sierra Club standing even though its "pleadings lacked meaningful explanation as to how the activities at the CISF might lead to a release which could affect any of their members."[49] Our standing precedents require petitioners "to show a specific and plausible means" for how the licensed activities will affect them in the absence of "'obvious' potential for offsite harm."[50] We generally defer to a Board's ruling on standing in the absence of clear error or an abuse of discretion.[51] In this case, the Board's finding of standing is reasonable given the size of the facility and Mr. Berry's activities in close proximity to that facility. We therefore reject Holtec's argument that Sierra Club failed to establish standing.

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47. LBP-19-4, 89 NRC at 366.

48. *Id.* at 367.

49. Holtec Opposition to Sierra Club at 28.

50. *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

51. *See, e.g.*, *Strata Energy*, CLI-12-12, 75 NRC at 608-13 (2012) (deferring to board's finding of standing based on dust from project employees driving near petitioner's house).

Appendix D

2. Sierra Club Contention 4 (Transportation Risks)

Sierra Club asserted in Contention 4 that section 4.9 of the ER inadequately addressed risks associated with transporting radioactive waste from the reactor sites to the CISF.[52] It argued that the ER fails to account for severe rail accidents that could release radiation. In support of its argument, Sierra Club relied on an analysis performed by its expert, Dr. Marvin Resnikoff, of the radiological consequences of a spent fuel canister subject to the conditions of a rail tunnel fire similar to one that took place in the Howard Street Tunnel in Baltimore in 2001 (Baltimore Tunnel Analysis).[53] The Baltimore Tunnel Analysis concluded that in a similar accident, a spent fuel cask would fail and the fuel rods would burst within eleven hours.[54] The study also provided estimates for the population exposed and latent cancer fatalities.[55] According to Sierra Club, Dr. Resnikoff has updated his 2001 Baltimore Analysis and now estimates that a major rail accident could release 20 million person-rem,

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52. Sierra Club Petition at 22-27.

53. Matthew Lamb & Marvin Resnikoff, *Radiological Consequences of Severe Rail Accidents Involving Spent Nuclear Fuel Shipments to Yucca Mountain: Hypothetical Baltimore Rail Tunnel Fire Involving SNF* (Sept. 2001), available at http://www.state.nv.us/nucwaste/news2001/nn11459.htm (last visited Nov. 7, 2019). According to the report, the Baltimore Tunnel Fire burned for three days or more at temperatures of at least 1500°F. *Id.* at 9.

54. *Id.* at 8-9.

55. *Id.* at 13; Sierra Club Petition at 24-25.

1250 times Holtec's estimate.[56] Sierra Club also claimed that Holtec underestimates the likelihood of a severe rail accident because Holtec relies on the Department of Energy's 2008 Yucca Mountain Final Supplemental Environmental Impact Statement (FSEIS), which Sierra Club claims is outdated and does not account for recent information about increased rail traffic, derailments, and fires.[57]

Holtec argued in its answer and at oral argument that because its ER incorporated specific portions of the DOE 2008 Yucca Mountain FSEIS, Sierra Club must specifically dispute the analysis in the DOE Supplemental Environmental Impact Statement (SEIS) in order to show a genuine dispute.[58] Holtec's ER accident analysis "tiered from" section 6.3.3.2 of the Yucca Mountain FSEIS.[59] In that section DOE responded to a 2001 study

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56. Sierra Club Petition at 25.

57. *Id.* at 25-26; *see* U.S. Department of Energy, Office of Civilian Radioactive Waste Management, "Final Supplemental 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" (June 2008), vol. 1, § 6.3.3 (ML081750191 (package)) (Yucca Mountain FSEIS).

58. *See* Holtec International's Answer Opposing Sierra Club's Petition to Intervene and Request for Adjudicatory Hearing on Holtec International's HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2018), at 28-29 (Holtec Answer to Sierra Club); Tr. at 258 ("The DOE analysis specifically addressed the higher estimates provided by Lamb and Resnikoff.").

59. *See* ER § 4.9.3.2 (transportation accident impacts).

by Matthew Lamb and Dr. Resnikoff that claimed that the latent cancer fatalities resulting from a severe accident in an urban area of Nevada could be between 13 and 40,868 (Nevada Accident Analysis).[60] DOE stated that this estimate was unrealistic because Mr. Lamb and Dr. Resnikoff had used conservative or bounding values for multiple parameters in their computer analysis, resulting in "unrealistically high yields."[61]

The Board rejected the contention on various grounds. The Board agreed with Holtec and found that Sierra Club had not shown a genuine dispute with the application because it had "not address[ed] or disput[ed]" the criticisms of the Lamb and Resnikoff Study contained in the Yucca Mountain FSEIS on which Holtec's ER had relied.[62] The Board further found that the contention posed a "worst case scenario," the consequences of which need not be discussed under NEPA.[63] The Board observed that the intensity of the Baltimore Tunnel Fire was caused by the flammable contents of the railcars, and, according to statements by Holtec's counsel during oral argument, shipments to the CISF will be in dedicated trains without

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60. Matthew Lamb et al., *Worst Case Credible Nuclear Transportation Accidents: Analysis for Urban and Rural Nevada* (Aug. 2001). The Yucca Mountain FSEIS refers to this document as DIRS 181756.

61. Yucca Mountain FSEIS at 6-23.

62. LBP-19-4, 89 NRC at 387.

63. *Id.* at 387-88 (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 352 (2002)).

such contents.[64] It concluded that a scenario similar to the Baltimore Tunnel Fire would be "extraordinarily unlikely."[65] It further found that Sierra Club had offered no facts or expert opinion to support its argument that Holtec failed to account for recent information about increased rail traffic and oil tanker rail cars.[66]

On appeal, Sierra Club reasserts its claim that the application has underestimated the consequences of an accident and argues that the Baltimore Tunnel Analysis was sufficient to raise a factual dispute.[67] It does not reassert its arguments about the likelihood of a rail accident. Nor does it address the Board's conclusion that the proposed contention sought an analysis of an "extraordinarily unlikely" worst case analysis.

We conclude that Sierra Club identifies no Board error in rejecting the contention. The Board is correct that NEPA does not require a "worst case" analysis for potential accident consequences.[68] In addition, the Board correctly found that Sierra Club offered no expert opinion or documentary support for its assertions about increased rail traffic or railroad fires. And although Sierra Club argues that the Yucca Mountain FSEIS is out of date, the

64. *Id.* (citing Tr. at 256-57).

65. *Id.* at 388.

66. *Id.* (citing Sierra Club Petition at 25-26).

67. Sierra Club Appeal at 9-11.

68. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989).

Baltimore Tunnel Analysis, on which Sierra Club relies, predates the Yucca Mountain FSEIS by several years.[69] Moreover, the NRC has studied what would happen to various spent fuel transportation packages if they were subjected to the conditions of the Baltimore Tunnel Fire and concluded that the potential consequences are negligible.[70] And contrary to the assertions in Sierra Club's contention, Dr. Resnikoff 's declaration provided no updated information on the subject except for a general statement that he "reviewed" and endorsed the claims in Sierra Club's contentions.[71] This is insufficient factual support for a contention. We therefore affirm the Board's decision to reject the contention.

3. Sierra Club Contention 8 (Decommissioning Funds)

Sierra Club argued in Contention 8 that Holtec's application does not set forth a plan to provide adequate funds for decommissioning.[72] Sierra Club argued that the amount that Holtec intends to set aside for decommissioning the site is "completely inadequate" to

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69. *See* Yucca Mountain FSEIS vol. 1, § 6.3.3.2.

70. *See* "Spent Fuel Transportation Package Risk Assessment" (Final Report), NUREG-2125, at 127 (Jan. 2014) (ML14031A323); "Spent Fuel Transportation Package Response to the Baltimore Tunnel Fire Scenario" NUREG/CR-6886, rev. 2, § 8.3 (Feb. 2009) (ML090570742).

71. Sierra Club Petition, Attach., Declaration of Marvin Resnikoff (Sept. 13, 2018).

72. *See* Sierra Club Petition at 35-37.

cover Holtec's $23 million estimated decommissioning costs.[73] In addition, Sierra Club argued that Holtec's decommissioning cost estimate only covers the first phase of the project and the application should explain how Holtec will fund decommissioning the site following the ensuing twenty phases.[74]

According to its application, Holtec plans to provide financial assurance for decommissioning by establishing a sinking fund coupled with a surety, insurance, or other guarantee as described in 10 C.F.R. § 72.30(e)(3). Specifically, Holtec intends to set aside $840 per MTU stored at the facility and counts on a 3% rate of return.[75] In its answer to Sierra Club's hearing request, Holtec argued that Sierra Club's calculations were incorrect for two reasons. First, Sierra Club had assumed that Holtec would only accept up to 5000 MTU in its initial phase and therefore set aside only $4,200,000 for future decommissioning. But Holtec's application is for a license to store up to 8680 MTU, which would require Holtec to provide up to $7,291,200 for future decommissioning.[76] Second, Holtec claimed that Sierra Club did not account for the 3% rate of return Holtec expects to earn on

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73. *Id.* at 36 (citing Holtec International & Eddy Lea Energy Alliance (ELEA) Underground CISF—Financial Assurance & Project Life Cycle Cost Estimates, Holtec Report No. HI-2177593 (undated), at 6 (ML18345A143) (Decommissioning Cost Estimate)).

74. *Id.*

75. Decommissioning Cost Estimate § 2.2.

76. Holtec Answer to Sierra Club at 44.

the funds set aside.[77] Holtec also pointed out that its decommissioning funding plan will have to be updated and resubmitted every three years.[78] Further, it argued, "even if there were some shortfall in Holtec's calculation of the amount of funds needing to be set aside (which there is not), it would be covered by the surety" and therefore the contention raised no genuine material dispute with the application.[79]

Sierra Club responded to Holtec by questioning its reliance on compound interest.[80] Sierra Club pointed out that if Holtec's fund were to earn only a 2% rate of return rather than the 3% upon which it relies, it would have only $10,941,921 after forty years, "far below" the $23 million estimate in the Decommissioning Funding Plan.[81] It further argued that it was "doubtful" that any surety company would issue a bond for Holtec's facility.[82] Holtec responded with a motion to strike the arguments concerning the rate of return and its ability to obtain a

77. *Id.* at 44-45; *see* Decommissioning Cost Estimate § 2.2.

78. Holtec Answer to Sierra Club. at 45-46; *see* 10 C.F.R. § 72.30(c).

79. Holtec Answer to Sierra Club at 46.

80. Sierra Club's Reply to Answers Filed by Holtec International and NRC Staff (Oct. 16, 2019), at 28 (Sierra Club Reply).

81. *Id.*

82. *Id.* at 29-30.

surety bond because these arguments were raised for the first time in the reply and therefore unjustifiably late.[83]

The Board found that Sierra Club's proposed Contention 8 had not raised a genuine dispute with the application. The Board rejected the argument that Holtec's decommissioning plan must show how it would fund decommissioning of all future expansions of the project because the application only covers the first phase and Holtec will have to update its plan for any future expansions.[84] The Board further rejected Sierra Club's arguments that Holtec could not rely on a "reasonable rate of return" of 3% and that a surety bond is ""doubtful" because those arguments were impermissibly late and factually unsupported.[85]

In its appeal, Sierra Club reiterates that the plan must provide for decommissioning all twenty phases of the project without identifying an error in the Board's analysis.[86] The Board correctly explained that any future expansion of the facility will require a license amendment and an update to the decommissioning plan. Because Sierra Club does not point to a Board error, there is no basis for us to reverse the Board; it is not sufficient for an

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83. Holtec International's Motion to Strike Portions of Replies of Alliance for Environmental Strategies, Don't Waste Michigan et al., NAC International Inc., and Sierra Club (Oct. 26, 2018), at 10-11.

84. LBP-19-4, 89 NRC at 393.

85. *Id.* at 393-94.

86. Sierra Club Appeal at 12-13.

appellant merely to repeat the arguments it made before the Board.[87] Sierra Club also reasserts its argument that Holtec provided no assurance that it will earn a 3% rate of return on the funds set aside for decommissioning.[88] Sierra Club does not address the Board's finding that the argument was impermissibly late. The 3% figure was included in Holtec's Decommissioning Cost Estimate at the time Sierra Club filed its contentions, and therefore Sierra Club could have challenged it then.[89] Moreover, Sierra Club does not counter the Board's finding that its argument was unsupported. In short, Sierra Club points to no Board error in rejecting this contention, and we affirm the Board.

4. Sierra Club Contention 9 (Impacts from Beyond Design Life and Service Life of Storage Containers)

Sierra Club argued in Contention 9 that the application must consider the risk that the storage canisters will be left on the CISF beyond their design life of 60 years and expected service life of 100 years.[90] Sierra Club pointed out that the HI-STORE UMAX canisters designated to be used at the site have only a 60-year design life and 100-year service life, whereas the ER states that the CISF may operate up to 120 years until a permanent repository

87. *Turkey Point*, CLI-17-12, 86 NRC at 219.

88. Sierra Club Appeal at 12-13.

89. *See* Decommissioning Cost Estimate § 2.2.

90. *See* Sierra Club Petition at 38-42.

is available to take the waste.[91] Moreover, Sierra Club argued that the ER should consider the possibility that a permanent repository never becomes available, making the Holtec site a *de facto* permanent repository.[92] Sierra Club further argued that the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (Continued Storage GEIS) is not applicable to the proposed Holtec facility.[93] Sierra Club argued that the analysis in the Continued Storage GEIS assumes that an away-from-reactor spent fuel storage facility will have a dry transfer system (DTS) to repackage damaged or leaking canisters whereas the Holtec facility will have no DTS.[94] Therefore, Sierra Club argued, the proposed Holtec facility is not like the hypothetical facility discussed in the Continued Storage GEIS.

The Board found that the contention presented both environmental and safety aspects, neither of which was admissible. It found that the environmental aspect of this contention impermissibly challenged the Continued Storage Rule and the Continued Storage GEIS because Sierra Club did not seek a rule waiver.[95] To the extent that

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91. *Id.* at 38-39 (citing ER § 1.0).

92. *Id.* at 40.

93. *Id.* at 40-41.

94. *Id.*; *see* "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel" (Final Report), NUREG-2157, vol. 1, ch. 5 (Sept. 2014) (ML14196A105) (Continued Storage GEIS).

95. LBP-19-4, 89 NRC at 395; *see* 10 C.F.R. § 51.23 (Continued Storage Rule); 10 C.F.R. § 2.335 (no Commission regulation is subject

proposed Contention 9 raised safety issues, the Board found that it did not raise a genuine dispute with the application because it "ignore[d] the SAR's discussion of retrievability, inspection, and maintenance activities."[96]

Sierra Club's appeal essentially reasserts its arguments before the Board without confronting the Board's findings. The Continued Storage Rule provides that long term environmental effects associated with spent fuel storage are set forth in the Continued Storage GEIS and need not be reiterated in individual license proceedings. On appeal, Sierra Club does not address the Board's finding that it must request a rule waiver in order to argue that the Continued Storage Rule should not apply in this proceeding.[97] Additionally, Sierra Club repeats the argument that the Continued Storage Rule does not apply to the proposed Holtec facility because the Continued Storage GEIS assumes the presence of a DTS.[98] However, its factual premise is mistaken. The Continued Storage GEIS assumes that a DTS would be built in the "long-term storage" and indefinite timeframes.[99] The

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to challenge in an individual licensing proceeding except when a waiver of the rule is sought and granted on the basis that application of the rule to the particular situation would not serve the purpose for which the rule was adopted).

96. LBP-19-4, 89 NRC at 395 (citing provisions of the SAR relating to monitoring, maintenance, and aging management).

97. *See* 10 C.F.R. § 2.335(b).

98. Sierra Club Appeal at 13-14.

99. Continued Storage GEIS § 1.8.2 at 1-14, § 5.0 at 5-2.

Continued Storage GEIS assumes that a DTS will not be present initially and that is consistent with Holtec's proposed facility. The application therefore does not need to discuss the effects of a DTS (or the consequences of not having a DTS). If Holtec receives a license and decides to build a DTS, then it would need to seek an amendment to its license.

Next, Sierra Club argues that the Board relied on Holtec's "unsupported conclusory statement that it will somehow monitor and retrieve the waste in the future" and reasserts its claim that "once a crack starts in a canister, it can break through and cause a leak in [sixteen] years."[100] But Holtec's statements are not unsupported or conclusory—its SAR discusses plans for inspection,

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100. Sierra Club Appeal at 14. Sierra Club points to a YouTube video which it claims depicts Holtec's President Krishna Singh acknowledging that Holtec canisters "cannot be inspected, repaired or repackaged." *Id.*; *see also* Sierra Club Petition at 41. But Dr. Singh does not say that the canisters cannot be inspected or repackaged. The video clip appears to show Dr. Singh at an October 14, 2014 meeting, in which he stated that should a canister develop a through-wall hole, it would not be practical to repair it, and the solution would be to isolate the canister in a cask. *See* www.youtube.com/watch?v=euaFZt0YPi4 (last visited Oct. 21, 2019). In its petition, Sierra Club cited an NRC Staff meeting summary where this statement was made, but it does not acknowledge that this discussion pertained to the specific phenomenon of chloride-induced stress corrosion cracking. *See* Sierra Club Petition at 41 (citing Memorandum from Kristina Banovac, Office of Nuclear Material Safety and Safeguards, to Anthony Hsia, Office of Nuclear Material Safety and Safeguards, "Summary of August 5, 2014, Public Meeting with Nuclear Energy Institute on Chloride Induced Stress Corrosion Cracking Regulatory Issue Resolution Protocol" (Sept. 9, 2014) (ML14258A081)).

maintenance, retrieval, and aging management.[101] The SAR specifically discusses the issue of stress corrosion cracking and concludes that, due to the low halide content of the air at the proposed CISF site, chloride-induced stress corrosion cracking is a remote possibility.[102] The SAR also describes how it will monitor the canisters to detect any stress corrosion cracking in its aging management program.[103]

The Board found that Sierra Club Contention 9 did not acknowledge or discuss these sections of the SAR or challenge the application's conclusion.[104] On appeal, Sierra Club does not address the Board's finding that it had failed to dispute relevant portions of the SAR.

We agree with the Board's conclusion that Sierra Club's petition did not challenge these discussions in the SAR.

We therefore conclude that Sierra Club's appeal does not identify Board error in rejecting its proposed Contention 9, and we affirm the Board.

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101. *See*, *e.g.*, SAR §§ 3.1.4.1 (inspection of incoming casks), 3.1.4.4 (surveillance during storage), 5.4.1.2 (the HI-STORM UMAX cask system allows retrieval "under all conditions of storage"); *see generally, id.* ch. 18, Aging Management Program.

102. *See* SAR §§ 17.11, 18.3.

103. *See* SAR §§ 18.3, 18.5.

104. LBP-19-4, 89 NRC at 395.

5. Sierra Club Contention 11 (Earthquakes)

Sierra Club argued in Contention 11 that the ER and SAR had inadequately discussed earthquake risks to the facility, including seismic activity induced by oil and gas recovery operations.[105] Sierra Club asserted that the information in Holtec's SAR and in its ER used "historical data that does not take into account the recent increase in drilling for oil and natural gas that creates induced earthquakes."[106] It attached to its petition a 2018 scientific study (the "Stanford Report"), which it claimed "documented the existence of prior earthquakes in southeast New Mexico" and "the existence of numerous faults in the area in and around the proposed Holtec site."[107] It also claimed that "the oil and gas industry" is concerned that the Holtec facility would impact oil and gas operations in the area and cited the scoping comments that Fasken Oil and Ranch, Ltd. and PBLRO Coalition submitted to NRC with respect to the Holtec application.[108]

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105. *See* Sierra Club Petition at 44-48.

106. *Id.* at 45-46; *see also* ER § 3.3.2; SAR § 2.6.

107. Sierra Club Petition at 44-45 (citing Jens-Erik Lund Snee and Mark D. Zobeck, *State of Stress in the Permian Basin, Texas and New Mexico: Implications for Induced Seismicity*, The Leading Edge, Feb. 2018, at 127-32 (Stanford Report)).

108. *Id.* at 47-48, Ex. 7, Letter from Tommy E. Taylor, Fasken Oil and Ranch, Ltd. to Michael Layton, NRC (July 30, 2018).

The Board rejected Sierra Club's contention because it presented no genuine dispute with the application.[109] The Board observed that the ER and SAR both used data from the 2016 U.S. Geological Survey, the latest available at the time of its 2017 application.[110] It found that Sierra Club had not provided evidence of any "significant seismic events around the proposed project site" since 2016 and therefore rejected the claim that the application was outdated.[111] The Board observed that both the ER and the SAR specifically discuss the effects of "fracking."[112] Finally, the Board found that there was "no dispute between the Stanford Report and the SAR's seismic analyses" and noted that the illustrations provided in the report appeared to confirm the SAR's claim that the closest Quaternary fault (active within the last 1.6 million years) is approximately seventy-five miles away and the nearest fault of any kind is forty miles from the site.[113]

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109. LBP-19-4. 89 NRC at 398.

110. *Id.*

111. *Id.*

112. *Id.* Holtec's ER and SAR discuss fluid injection and induced seismicity from the oil and gas industry. *See* SAR § 2.6.2; ER § 3.3.2.1. The Stanford Report does not use the term "fracking," but it discusses fluid or wastewater injection. *See*, *e.g.*, Stanford Report at 127 (noting that "[f]luid injection and hydrocarbon production have been suspected as the triggering mechanisms for numerous earthquakes that have occurred in the Permian Basin since the 1960s").

113. LBP-19-4, 89 NRC at 398-99; *see* SAR § 2.6.2 at 2-108.

On appeal, Sierra Club reasserts its claims that Holtec's information is out of date and that the Stanford Report contradicts information in the application. But the Sierra Club adds a new claim with respect to the Stanford Report—that the report "document[s] that due to increased fracking for oil and gas, new geologic faults are being induced, coming nearer to the Holtec site."[114]

We deny the appeal for many of the same reasons outlined by the Board. First, we agree with the Board that Holtec's use of 2016 USGS data was not "out of date" and Sierra Club provided no evidence of recent seismic activity near the site. The Board reasonably concluded that the maps included in the Stanford Report seemed to confirm, rather than contradict, the SAR's statements that there were no Quaternary faults within the immediate area of the Holtec site.[115] And although the Stanford Report discusses earthquakes occurring ""since 2017," there is no indication that these are stronger earthquakes than previously seen or that they occurred particularly near the site of the proposed Holtec facility.[116]

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114. Sierra Club Appeal at 15.

115. LBP-19-4, 89 NRC at 398-99.

116. *See* Stanford Report at 127. The report mentions that since January 2017, "at least three groups of earthquakes, surrounded by more diffusely located events, have occurred in the southern Delaware Basin, near Pecos, Texas. A fourth group of events occurred mostly in mid-November 2017, farther to the west in northeastern Jeff Davis County [Texas]. In addition, a group of mostly small ($M_L < 2$) earthquakes occurred between Midland [Texas] and Odessa [Texas], in the Midland Basin." *Id.* The Holtec site is in the northern Delaware Basin.

We are not persuaded by Sierra Club's argument that the Stanford Report shows that oil and gas activities are inducing "new geologic faults . . . coming nearer to the Holtec site."[117] This argument is new on appeal; the original contention did not claim that fracking is causing new faults to form near the Holtec site.[118] The claim also appears to be unsupported by the Stanford Report, which does not indicate that new faults or earthquakes are getting closer to the Holtec site.[119]

We therefore find no error in the Board's determination that Sierra Club had not raised a genuine dispute with the application in Contention 11.

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117. Sierra Club Appeal at 15.

118. We do not consider on appeal new arguments or new evidence that the Board had no opportunity to consider. *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006).

119. The Stanford Report is generally about new measurements of stress orientation and how that information might be used to predict and prevent slip on mapped faults due to fluid injection or extraction. Stanford Report at 127. Sierra Club did not point out where the document provided information in support of its claim. A board is expected to examine the documents provided in support of a proposed contention to verify that the material says what a party claims it does, but we do not expect a board to search through a document for support for a party's claims. *USEC Inc.*, CLI-06-10, 63 NRC at 457.

6. Sierra Club Contentions 15-19 (Groundwater Impacts)

Sierra Club's Contentions 15-19 all concerned potential impacts to groundwater from the CISF.[120] Contention 15 argued that the ER had not adequately determined whether there is shallow groundwater at the site and therefore could not adequately assess the impact of a radioactive leak from the site.[121] Contention 16 argued that the ER had not considered whether brine from a previous underground brine disposal operation was still present on the site and whether that brine could corrode the UMAX waste containers.[122] Contention 17 argued that the ER and SAR did not consider the presence and effects of fractured rock beneath the site, which could allow radioactive leaks into groundwater from the cask or allow the aforementioned brine to enter the casks and corrode the canisters.[123] Contention 18 argued that the ER had not discussed the possibility that "waste-contaminated groundwater" could reach the nearby Santa Rosa Formation aquifer, which is an important source of drinking water.[124] Contention 19 argued that Holtec may have improperly conducted tests for hydraulic conductivity between the site and the Santa Rosa Formation.[125]

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120. *See* Sierra Club Petition at 60-67.

121. *Id.* at 60-62.

122. *Id.* at 62-63.

123. *Id.* at 63-65.

124. *Id.* at 65-66.

125. *Id.* at 66-67.

Appendix D

a. Groundwater Contentions as Challenge to Certified Design

The Board rejected all the groundwater contentions. It found that they failed to dispute the application's conclusion that there is no potential for groundwater contamination because spent nuclear fuel contains no liquid component to leak out, and it is not credible that groundwater could leak into the canisters.[126] The Board observed that the canisters are contained within a steel cavity enclosure container that has no penetrations or openings on the bottom, thereby preventing outside liquids from contacting the canisters or the spent nuclear fuel within them.[127] The Board further found that Sierra Club had failed to dispute Holtec's conclusion that the canisters would not be breached during normal operations or any "credible off-normal event" or accident.[128] The Board cited our holding in *Private Fuel Storage* that "[t]o show a genuine material dispute, [a petitioner's] contention would have to give the Board reason to believe that contamination from a defective canister could find its way outside a cask."[129]

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126. LBP-19-4, 89 NRC at 404-05 (citing ER § 1.3 at 1-8).

127. *Id.* at 407.

128. *Id.* at 404, 408; *see* ER § 4.13 (off-normal operations and accidents).

129. LBP-19-4, 89 NRC at 405 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 138-39 (2004)).

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The Board rejected Sierra Club's argument that the material Sierra Club supplied in connection with its proposed Contentions 9, 14, 20, and 23 showed various mechanisms through which a canister could be breached. In doing so, the Board held that those contentions did not adequately support the groundwater contentions because they were also inadmissible.[130]

On appeal, Sierra Club argues that in rejecting its Contentions 9, 14, 20, and 23, the Board did not "conclusively" find that the information supporting them was "incorrect."[131] Therefore, Sierra Club argues, its petition to intervene did controvert Holtec's "assertion that the containers are impervious to leaking."[132]

While it is true that in rejecting these contentions, the Board did not make a factual finding that the claims in them were "incorrect", Contentions 9, 14, 20, and 23 were not rejected on mere pleading technicalities, as Sierra Club appears to suggest. The Board found that each of those contentions was inadmissible because (among other reasons) they challenged the certified design of the HI-STORM UMAX system. Because certified designs are incorporated into our regulations, they may not be attacked in an adjudicatory proceeding except when authorized by a rule waiver.[133]

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130. *Id.* at 404.

131. Sierra Club Appeal at 18.

132. *Id.* at 17.

133. 10 C.F.R. § 2.335.

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A contention cannot attack a certified design without a rule waiver because this would challenge matters already fully considered and resolved in the design certification review. For example, Sierra Club Contention 14 argued that the HI-STORM UMAX casks are susceptible to overheating because the air intake and exhaust vents are both located at the top of the cask and that overheating could cause cladding degradation and corrosion.[134] The Board noted that the SAR "fully incorporates by reference the HI-STORM UMAX design and thermal analysis conducted in the HI-STORM UMAX's own Final Safety Analysis Report" and that therefore, "any challenge to the HI-STORM UMAX system design characteristics that are already deemed compliant with Part 72, including those Sierra Club designates in Contention 14 . . . are barred in this proceeding by sections 2.335 and 72.46(e)."[135] We agree with the Board's conclusion that Sierra Club's disagreement with the HI-STORM UMAX certified design cannot be used to support its claim that the CISF might leak.

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134. Sierra Club Petition at 56-60.

135. LBP-19-4, 89 NRC at 402. Similarly, Sierra Club Contention 20 argued that the canisters stored at the facility would likely contain high burnup fuel, which, according to Sierra Club, can lead to thinned, embrittled or damaged cladding. Sierra Club Petition at 67-70. Sierra Club Contention 23 argued that high burnup fuel could damage the spent fuel cladding during transportation or storage and that damaged fuel would not be accepted at a permanent repository. *Id.* at 73-75. But the Board rejected the contentions because the HI-STORM UMAX canister storage system is approved for storage of high burnup fuel, and therefore, the contentions are barred by regulation. *See* LBP-19-4, 89 NRC at 412, 416-17.

To the extent that the groundwater contentions seek to raise design issues with the HI-STORM UMAX canister system, the Board correctly found that they challenged our regulations without seeking a waiver and are not admissible. Therefore, to the extent that the groundwater contentions are predicated on the argument that the system could leak, we affirm the Board's ruling that Sierra Club had not presented a sufficient factual basis for that claim and the contentions are not admissible.

b. Groundwater Contentions as Challenges to Site Characterization

Sierra Club next argues that its groundwater contentions challenge the ER's characterization of the affected environment, which the ER must provide regardless of whether the canisters could leak.[136] The Staff acknowledges that the ER must characterize the site, but it argues that impacts need "'only be discussed in proportion to their significance.'"[137] Similarly, relying on the same passage in *Private Fuel Storage* quoted by the Board, Holtec argues that Sierra Club's claims about groundwater characterization are not "material" to the outcome of this proceeding because Sierra Club has not shown that radionuclides could make their way outside the cask.[138]

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136. Sierra Club Appeal at 17.

137. Staff Opposition to Sierra Club Appeal at 18 (quoting 10 C.F.R. § 51.45(b)(1)).

138. Holtec Opposition to Sierra Club Appeal at 24 (quoting *Private Fuel Storage*, CLI-04-22, 60 NRC at 138-39).

Of the five groundwater contentions, only Contention 18 was based entirely on the premise that leaks from the facility would contaminate the groundwater. The other contentions all raised specific arguments about the adequacy of the hydrogeological site characterization, were supported by expert opinion, and identified the portions of the application in question. In proposed Contention 15, Sierra Club questioned Holtec's claim that there is no shallow groundwater at the site and argued that Holtec relies on data from a single well in the 1040-acre site, which has apparently not been checked since 2007.[139] According to the declaration of Sierra Club's expert, George Rice, there are various reasons why a saturated condition may not have been encountered during drilling even though the "materials are saturated."[140] In Contention 16, Sierra Club argued that Holtec should determine whether brine in the groundwater could contact the facility and what effect brine could have on its structures. It pointed to ER § 3.5.2.1, which acknowledges that as of 2007 ""saturations of shallow groundwater brine" have been created in the region due to brine disposal.[141] And in support of Sierra Club Contention 19, Mr. Rice identified three specific flaws that he claims undermine the reliability of Holtec's hydraulic conductivity tests.[142]

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139. *See* Sierra Club Standing Declarations and Expert Declarations, Declaration of George Rice (Sept. 10, 2018), at 2 (ML18257A226 (package)) (Rice Declaration).

140. *Id.* at 3.

141. Sierra Club Petition at 62.

142. According to Mr. Rice, the report from Holtec's contractor did not confirm that it cleaned the well holes prior to the tests, used

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Our regulations require an admissible contention to show a "genuine dispute exists with the applicant/licensee on a material issue of law or fact."[143] A "dispute at issue is 'material' if its resolution would 'make a difference in the outcome of the licensing proceeding.'"[144] Moreover, in the NEPA context we have warned, "[o]ne can always flyspeck an [Environmental Impact Statement (EIS)] to come up with more specifics and more areas of discussion that could have been included."[145]

The Supreme Court has explained that to fulfill NEPA's mandate, for certain major Federal actions such as this one, an agency must prepare an EIS, which "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts" and that such information will be available to the public.[146] It is possible that, to the extent Sierra Club's

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clean water, or took three or more readings at five-minute intervals as recommended by the U.S. Bureau of Reclamation's field manual. *See* Rice Declaration at 8.

143. 10 C.F.R. § 2.309(f)(1)(vi).

144. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 333-34 (1999) (quoting Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,168, 33,172 (1989)).

145. *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 71 (2001).

146. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

groundwater contentions are purely site-characterization disputes, they fail to show a material dispute with the application because they do not indicate how Sierra Club's groundwater concerns would affect the ultimate discussion of environmental impacts.[147]

But initial determinations of contention admissibility rest with the Board, and the Board did not discuss whether any of the groundwater contentions contained a genuine issue *apart* from the claims that radioactive leaks from the canisters could contaminate the groundwater. Within the context of the need to determine whether the groundwater concerns would affect the ultimate discussion of environmental impacts, we remand Contentions 15, 16, 17, and 19 to the Board for further consideration of their admissibility with respect to the site characterization.

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147. While not binding precedent, licensing boards have generally considered site characterization claims under NEPA that explained why the site characterization was necessary to fully understand the impacts of the proposed action. *E.g.*, *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-15-3, 81 NRC 65, 89-92 (2015) (responding to a site characterization claim by noting, "[a]t the crux of this contention is the issue of whether, to comply with NEPA's requirement to make an adequate prelicensing assessment of environmental impacts, more extensive monitoring . . . is required"); *Powertech (USA) Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 47-51 (2013) (allowing site characterization issues to migrate "to the extent" they challenged applicant's demonstration of aquifer confinement and impacts to groundwater).

7. Sierra Club Contention 26 (Material False Statement); Joint Petitioners' Contention 14 (Material False Statement)

Sierra Club submitted its new Contention 26, and Joint Petitioners their Contention 14, after Holtec amended its license application to provide that its clients would *either* be the DOE or nuclear plant owners.[148] As the Board observed, the two contentions are "substantially identical."[149] Sierra Club and Joint Petitioners argued that even though Holtec's application represents that nuclear plant owners may be its future customers, in reality Holtec still intends to go forward with the project only if it is able to secure a contract with DOE. They argued that various public statements by Holtec officials "show that Holtec's intention has always been to rely on DOE, not the nuclear plant owners, taking title to the waste."[150] For proof, Sierra Club and Joint Petitioners cited a Holtec

148. *See* Sierra Club's Motion to File a New Late-Filed Contention (Jan. 19, 2019) (Sierra Club Motion for Late Contention); Attach., Contention 26 (Jan. 19, 2019) (Sierra Club Contention 26); Motion by Petitioners Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group for Leave to File a New Contention (Jan 17, 2019) (Joint Petitioners Motion for Late Contention); DWM's Contention 14 (Jan. 17, 2019) (Joint Petitioners' Contention 14).

149. LBP-19-4, 89 NRC at 451.

150. Sierra Club Contention 26 at 3 (unnumbered); Joint Petitioners Contention 14 at 2 (unnumbered).

public email that stated that deployment of the CISF "will ultimately depend on the DOE and the U.S. Congress."[151]

Sierra Club and Joint Petitioners argued that this email shows that representations in the application that nuclear plant owners may be Holtec's future customers are therefore "materially false." They argue that this ""material false statement" should be reason enough to deny an application because the Atomic Energy Act of 1954, section 186, expressly provides that a license may be revoked over a "material false statement."[152]

The Board found the contentions inadmissible because the statements in the email did not indicate that there was a "willful misrepresentation" in Holtec's application.[153] The Board found that Holtec "readily acknowledges that it hopes Congress will change the law" to allow DOE to contract directly with Holtec and that Holtec itself pointed out that the need for the project could be reduced or eliminated if DOE were to build a permanent waste repository.[154] In short, the Board determined that Holtec has been transparent that deployment of this project may depend to some extent on actions of DOE and Congress as well as on the NRC's licensing decision.

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151. *See* Sierra Club Motion for Late Contention, Exhibit 11, Holtec Highlights, Holtec Reprising 2018 (Jan. 2, 2019) (also attached to Joint Petitioners Contention 14 as Ex. 1).

152. *See* Sierra Club Contention 26; Joint Petitioners Contention 14; 42 U.S.C. §§ 2011, 2236.

153. LBP-19-4, 89 NRC at 421, 452.

154. *Id.* at 421.

Moreover, the Board found that whether Holtec would use its license if Congress does not change the law is not an issue material to the license proceeding: "[T]he business decision of whether to use a license has no bearing on a licensee's ability to safely conduct the activities the license authorizes."[155]

On appeal, Sierra Club and Joint Petitioners principally repeat the arguments the Board rejected. But Sierra Club further argues that "Holtec is attempting to obtain a license on the false premise that nuclear plant owners will retain title to the waste. Then, once Holtec obtains the license, it will use that fact as leverage to persuade Congress to change the law to allow DOE to hold title to the waste."[156] Even assuming Sierra Club's characterization of Holtec's intent were accurate, we agree with the Board that the statements in the application are not false. We further agree that the material issue in this license proceeding is whether Holtec has shown that it can safely operate the facility, not its future political activity or business intentions. We therefore affirm the Board with respect to Sierra Club Contention 26 and Joint Petitioners Contention 14.

8. Sierra Club Contention 30

Sierra Club filed its new proposed Contention 30 in response to a report by the Nuclear Waste Technical Review Board (NWTRB) that discusses technical issues

155. *Id.* at 422.

156. Sierra Club Appeal at 20-21.

presented by transportation of nuclear waste and spent nuclear fuel.[157] Sierra Club argues that the NWTRB report shows that various assumptions in the ER are invalid and that there are "barriers to the implementation of the Holtec CIS project" that must be discussed in the ER.[158]

Sierra Club filed this contention after the Board's jurisdiction terminated—that is, after all contentions had been dismissed, the record closed and jurisdiction to consider the motion passed to the Commission. Although we have reopened the record for the limited purpose of determining the admissibility of Sierra Club's groundwater contentions, the record remains closed for any other purpose.[159] Therefore, Sierra Club's motion for a new contention must also meet the standards for reopening a closed record.[160]

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157. *See* Sierra Club Motion for New Contention 30, Attach., Nuclear Waste Technical Review Board, Preparing for Nuclear Waste Transportation—Technical Issues that Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste (Sept. 2019); *see also* Holtec International's Answer Opposing Sierra Club New Contention 30 (Nov. 18, 2019); NRC Staff Opposition to Sierra Club New Contention 30 (Nov. 18, 2019).

158. Sierra Club Contention 30, at 1 (unnumbered).

159. *See, e.g.*, *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-20, 74 NRC 65, 76 (2011), *review denied*, CLI-12-10, 75 NRC 479 (2012).

160. *See, e.g.*, *Virginia Electric and Power Co.* (North Anna Power Station, Unit 3), CLI-12-14, 75 NRC 692, 699-700 (2012);

Even where jurisdiction to consider reopening has passed to the Commission, however, we frequently remand such motions to the Board to consider the reopening standards in conjunction with contention admissibility, where appropriate.[161] We find this action appropriate here. Therefore, we remand Sierra Club's proposed Contention 30, including the issue of whether the reopening standards are met, to the Board.

D. AFES Appeal

Alliance for Environmental Strategies (AFES) is an environmental group with members located near the proposed Holtec storage site in Lea and Eddy County.[162] It proposed three contentions, all dealing with environmental justice concerns.[163] The Board rejected all three contentions, and AFES has appealed.[164]

Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-12-3, 75 NRC 132, 140-41 (2012); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station), CLI-09-5, 69 NRC 115, 124 (2009).

161. *North Anna*, CLI-12-14, 75 NRC at 702.

162. Petition to Intervene and Request for Hearing (Sept. 12, 2018), at 1 (AFES Petition).

163. *Id.* at 11-24.

164. Petition for Review by Alliance for Environmental Strategies (May 31, 2019) (AFES Appeal).

Appendix D

1. AFES Contention 1: Environmental Justice Analysis Includes Insufficient Consideration of Alternative Sites

AFES' proposed Contention 1 raised environmental justice concerns with Holtec's site alternatives analysis. It claimed that Holtec, "as a matter of law," had not investigated enough sites "to support a finding by the Nuclear Regulatory Commission that the selected site will not have a disparate impact on the minority population of Lea and Eddy County."[165] Accordingly, proposed Contention 1 called for a new ER "that both studies and addresses alternative sites nationwide, why such sites are rejected, and what impact the selected site will have on minority and low-income local populations."[166]

The Board ruled proposed Contention 1 inadmissible because Holtec's ER complied with applicable NRC guidance on environmental justice evaluations in licensing actions.[167] The Board found that Holtec's ER "describes the social and economic characteristics of the 50-mile region of influence (ROI) around Holtec's proposed facility" and "identifies percentages of minority and low-income communities within the Holtec facility's ROI" that would

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165. AFES Petition at 11.

166. *Id.* at 21.

167. *See* Final Report, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG-1748 at 6-25 (Aug. 2003) (NUREG-1748); *see also* Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

be subject to the impacts of the facility, as recommended by NRC guidance.[168] The Board observed that according to applicable guidance, a difference of twenty percent or more in the percentage of minority or low-income population, when compared to the rest of the county and state, is a significant difference requiring further investigation.[169] But the Board found that Holtec did not identify differences greater than twenty percent and therefore did not discuss environmental justice concerns any further.[170] The Board also found that the ER "contains an analysis of location alternatives" including "six other potential sites that were analyzed and considered for suitability of the Holtec HI-STORE consolidated interim storage facility's characteristics."[171] The Board declined to admit proposed Contention 1 because "AFES has not shown any legal requirement for Holtec to conduct a more in-depth inquiry into alternatives to the proposed action (i.e., the siting of the facility) or environmental justice analyses in its Environmental Report"; therefore, the contention failed to show a genuine dispute with the application regarding a material issue of law or fact.[172]

On appeal, AFES argues that Holtec's environmental justice evaluation was insufficient because it failed to

168. LBP-19-4, 89 NRC at 455.

169. *Id.* (citing NUREG-1748 at C-5).

170. *Id.*

171. *Id.*

172. *Id.* (internal citations omitted).

compare the population near the proposed site to the population of the United States as a whole.[173] AFES argues the Board was wrong "as a matter of law" to credit the ER's discussion of alternative sites because "Holtec merely re-hashed a prior investigation by a third party, with regard to a previously abandoned site for a different facility" that includes "no discussion of *any* environmental justice concerns," resulting in a "precipitous narrowing of potential alternatives to a single site in southeastern New Mexico . . . directly contrary to the NRC's Policy Statements."[174]

By way of background, Holtec acknowledges that it relied on a previous study by the Eddy-Lea Energy Alliance (ELEA) for much of the environmental information in its ER. The ER explains that in 2006, DOE sought bids for locating a spent fuel recycling center and developed a set of criteria for an ideal site.[175] Eddy, New Mexico and Lea, New Mexico formed the ELEA to find a site within their jurisdiction and propose it to DOE.[176] The ELEA 2007 report analyzed six sites within the two counties with emphasis on the DOE's site selection criteria, which

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173. AFES Appeal at 17.

174. *Id.* at 5, 13-15.

175. ER § 2.3.

176. *Id. See* Letter from Johnny Cope, Chairman, ELEA, to Debbie Swichkow, DOE (Apr. 28, 2007), Encl. "GNEP Final Detailed Siting Report for the Consolidated Fuel Treatment Center and Advanced Recycling Reactor" (ML17310A225, ML17310A227, ML17310A230) (ELEA 2007).

included low population density in the surrounding area, adequate size, low flood risk, and seismic stability. These factors also correspond to Holtec's needs for a waste storage facility.[177] Holtec states that it reviewed ELEA's analysis and determined that the selected site is the best for its own project.[178]

The pertinent NRC Policy Statement in this case is the NRC's Environmental Justice Policy Statement.[179] That Policy Statement provides that NRC will identify minority and low-income populations near proposed nuclear sites so that it can determine whether the environmental impacts associated with a given site will be different for those populations when compared to the general population of the surrounding area, not the country as a whole.[180] An objective of the Policy Statement is that minority and low-income communities "affected by the proposed action are not overlooked in assessing the potential for significant impacts unique to those communities."[181]

The Board found that Holtec provided information about the impacts to minority and low-income populations within the geographic region of the proposed action, that

177. ER § 2.3.

178. *Id.* at 2-16.

179. *See* Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040 (Aug. 24, 2004).

180. *See id.* at 52,048.

181. *See id.*

the demographics did not show a disproportionate number of minorities or low-income people in the vicinity of the site, and that AFES had not disputed the information provided.[182] But on appeal, AFES argues that other sites "[o]utside of these isolated, low-income communities" need to be analyzed, including sites "outside of New Mexico," because "the targeting of rural, impoverished, low-income communities in a border state is precisely the sort of *de facto* result of the institutional racism embedded in prevailing dump site selection processes nationwide that was decried over thirty years ago . . . by the Licensing Board in [*Claiborne*]."[183]

However, we reversed on appeal the board decision in *Claiborne*, upon which AFES relies, which admitted a contention claiming racial bias in the applicant's site-selection process.[184] In doing so, we explicitly rejected the

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182. AFES repeatedly asserts that Holtec's evaluation of alternative sites is deficient because it relies on information developed by third parties. *See*, *e.g.*, AFES Appeal at 5, 8. AFES does not point out any factual error or omission in the third-party information relied upon, however, and reliance on prior studies is commonplace in environmental impact analysis. The Board was therefore correct in its conclusion that AFES presented no genuine factual or legal dispute with this argument.

183. *Id.* at 15-16 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367 (1997)).

184. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77 (1998); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation) CLI-98-13, 48 NRC 26, 36 (1998) (cautioning the Licensing Board that a contention not focused on disparate environmental impacts on minority or

idea that NEPA requires "an elaborate comparative site study" to explore whether an applicant's siting criteria "might perpetuate institutional racism."[185] The Board's rejection of AFES's proposed Contention 1 in this case accords with our stated environmental justice policy. We therefore affirm the Board's holding that environmental justice does not require consideration of a wider range of alternative sites.[186]

2. AFES Contention 2: Disparate Impacts of Siting Process

In proposed Contention 2, AFES asserted that "New Mexico has been targeted for the dumping of nuclear waste, resulting in a *per se* discriminatory impact on New

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low-income populations but instead seeking "a broad NRC inquiry into questions of motivation and social equity in siting" would "lay outside NEPA's purview.").

185. *Louisiana Energy Services*, CLI-98-3, 47 NRC at 104.

186. Our guidance for NEPA reviews of materials license applications provides limited guidance regarding how wide an area should be examined in identifying potential alternative sites for a proposed project. *See* NUREG-1748 § 5.2. Although Holtec elected to limit its evaluation to six sites in two counties within the same state, the Staff is not limited to considering only those sites proposed by Holtec in its environmental impact statement. *See*, *e.g.*, Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 (Dec. 2001), at 7-1 to 7-6 (ML020150217) (site selection process entailed evaluation of thirty-eight potential sites across fifteen states) (Private Fuel Storage EIS).

Mexico's minority population, in comparison with the rest of the country."[187] It included an affidavit of Professor Myrriah Gomez entitled, "Environmental Racism an Active Factor in the Siting and White Privilege Associated with the Holtec International HI-STORE Consolidated Interim Storage Facility Project."[188] According to AFES, "[t]his *de facto* discrimination is exacerbated by both the historical failure to include members of the minority population in decision making regarding the location of nuclear sites in New Mexico, and the specific failure . . . to include members of the local Lea and Eddy County minority population in decision making" regarding the siting of Holtec's proposed CISF.[189]

The Board found proposed Contention 2 inadmissible because it did not show a genuine dispute with the application on a material issue of law or fact: "Holtec addressed environmental justice matters to the depth recommended by NRC guidance, and neither AFES's petition nor Dr. Gomez's affidavit challenge the information in Holtec's Environmental Report."[190]

On appeal, AFES does not challenge the Board's finding that Holtec's ER comports with NRC policy and guidance on environmental justice evaluations. AFES reiterates its position that Holtec's environmental justice

187. AFES Petition at 22.

188. *Id.*

189. *Id.*

190. LBP-19-4, 89 NRC at 456.

analysis was insufficient because it did not include "an effective scoping process and an independent review of the impact—including the cumulative impact—of the site on minority and low-income populations along the border."[191] But AFES provides no further information in support of that position, which the Board rejected. This is insufficient to sustain an appeal, and we find no error in the Board's decision to deny the admission of proposed Contention 2.

3. AFES Contention 3: Community Support

AFES's proposed Contention 3 claimed that there is no factual basis for Holtec's assertions in its ER that there is community support for the project.[192] Although AFES conceded that community support is not normally material to the findings NRC must make to issue a license, it argued that it should nevertheless be considered material in this case because Holtec had referred to community support in its siting analysis.

The Board ruled the contention inadmissible "because the issue of public support for the proposed facility is not material to the findings the NRC must make in this licensing proceeding," and "[a]ssertion of community support or opposition in a license application does not lend any weight to the environmental justice analysis to be conducted by the applicant."[193]

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191. AFES Appeal at 18.

192. AFES Petition at 23.

193. LBP-19-4, 89 NRC at 457.

On appeal, AFES argues that proposed Contention 1 and proposed Contention 3 are linked, such that if the latter is inadmissible, the former must be admitted.[194] It argues that if community support was an adequate reason to narrow Holtec's site selection to only the Eddy-Lea county area, then Holtec should have to show that community support actually exists. We disagree. Holtec explained that community support was but one of many siting factors—including seismic stability, low population density, and low flooding risk—that it used in its site selection process.[195] Holtec did not discuss community support in its environmental justice analysis—nor did it ""substitute" community support for an environmental justice analysis, as AFES claims.[196] The Board reasonably evaluated the proposed contentions against the admissibility standards in our regulations, and its decisions on each were, in our view, clear, well-reasoned, and with ample support in the record and in accordance with our established precedents.

E. Joint Petitioners Appeal

The Board rejected the Joint Petitioners' hearing request on both standing and contention admissibility grounds. It found that the Joint Petitioners based their standing not on their individual members' proximity to

194. AFES Appeal at 18-19.

195. ER §§ 2.3, 2.4.2; *see* Holtec International's Brief in Opposition to Alliance for Environmental Strategies' Appeal of LBP-19-4 (June 25, 2019), at 10-11.

196. *See* ER § 3.8.5.

the proposed facility but on the members' proximity to transportation routes, which, it held, is too remote and speculative an interest to confer standing.[197] Moreover, it examined each of Joint Petitioners' fourteen proposed contentions (except two) and found them inadmissible.[198] Joint Petitioners have appealed the Board's rulings with respect to standing as well as the admissibility of eight of its proposed contentions.[199] As explained below, the Board correctly found that none of those eight contentions were

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197. *See* Petition of Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternative to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace and Nuclear Issues Study Group to Intervene and Request for an Adjudicatory Hearing (Sept. 14, 2018) (Joint Petitioners Petition); LBP-19-4, 89 NRC at 367 (citing *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 n.11 (2004); *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-2, 73 NRC 613, 623 (2011); *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 434 (2002)).

198. *See* LBP-19-4, 89 NRC at 426-52. Joint Petitioners' proposed Contention 8 was withdrawn and its proposed Contention 13 was a motion to adopt Sierra Club's contentions, which the Board rejected because a petitioner must establish standing and sponsor its own admissible contention before it can adopt another party's contentions. *Id.* at 451.

199. Notice of Appeal of LBP-19-4 by Petitioners Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Louis Obispo Mothers for Peace and Nuclear Issues Study Group, and Brief in Support of Appeal (June 3, 2019) (Joint Petitioners Appeal).

admissible. Therefore, we need not reach the issue of Joint Petitioners' standing.

1. Joint Petitioners Contention 1: Redaction of Historic and Cultural Properties Precludes Public Consultation and Participation

Joint Petitioners argued in their proposed Contention 1 that Holtec violated section 106 of the National Historic Preservation Act (NHPA) by redacting 144 pages of the ER that contain information about two historic or cultural properties that will be destroyed to make way for the proposed CISF.[200] The Board found that Holtec did *not* redact its ER. The Board explained that the Staff, having reached a preliminary conclusion that disclosure of Appendix C to the ER might risk harm to a potential historic resource, temporarily redacted it to comply with the NHPA, which requires withholding information from the public where public disclosure could risk such harm.[201]

On appeal, Joint Petitioners do not dispute the Board's findings that the Staff "redacted Appendix C in accordance with the NHPA," or that the Staff would, after completing consultation with the Keeper of the National Register of Historic Places, "make available to the public any information that would not harm any potential historic

200. *See* Joint Petitioners Petition at 27-31.

201. LBP-19-4, 89 NRC at 427; *see also* 54 U.S.C. § 307103(a) (requiring an agency to withhold information that may cause harm to a historic place).

properties."[202] Rather, Joint Petitioners explain why they did not request access to the sensitive information in Appendix C even though they had the opportunity to do so.[203] That explanation has no bearing on whether the Board abused its discretion or otherwise committed an error in denying the contention. We therefore see no basis to disturb the Board's ruling that proposed Contention 1 was inadmissible.

2. Joint Petitioners Contention 2: Insufficient Assurance of Financing

Joint Petitioners argued in proposed Contention 2 that Holtec cannot provide reasonable assurance that it has or will obtain the necessary funds to build, operate, and decommission the CISF.[204] Joint Petitioners argued that Holtec's application "states that it will solely finance the CISF from internal resources, but inconsistently states at the same time that it must have definite contractual arrangements with the U.S. DOE and the outside funding that would come with those arrangements in order to undertake the CISF."[205] Therefore, Joint Petitioners argued, Holtec's financial assurance depends on contracts that are not lawful.[206]

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202. LBP-19-4, 89 NRC at 427.

203. *See* Joint Petitioners Appeal at 20-21; LBP-19-4, 89 NRC at 427.

204. *See* Joint Petitioners Petition at 31-36.

205. *Id.* at 32.

206. *Id.* at 32-33.

Joint Petitioners moved to amend their contention twice. The first amendment responded to Holtec's revision of the application to provide that nuclear power plant owners might be its customers and argued that the application is unlawful until all references to DOE are stricken from it.[207] The Board allowed the first amendment but rejected the substance of the claim.[208] Joint Petitioners do not appeal that ruling.

Joint Petitioners attempted to amend the contention a second time after Holtec's counsel conceded at oral argument on January 24, 2019, that DOE cannot currently contract with Holtec to store nuclear power companies' spent fuel.[209] The Board denied Joint Petitioners' second requested amendment because it sought to add arguments that could have been submitted with the original petition.[210] The Board found the second requested amendment was therefore not based upon new information.[211] Accordingly,

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207. Motion by [Joint Petitioners] to Amend Their Contention 2 Regarding Federal Ownership of Spent Fuel in the Holtec International Revised License Application (Feb. 6, 2019) at 8.

208. LBP-19-4, 89 NRC at 428-29.

209. *See* Motion of [Joint Petitioners] to Amend Their Contention 2 Regarding Holtec's Proposed Means of Financing the Consolidated Interim Storage Facility (Feb. 25, 2019) (Joint Petitioners Second Motion to Amend).

210. LBP-19-4, 89 NRC at 429-432.

211. *Id.* at 430. The Board reached its decision after analyzing the sworn declaration of Joint Petitioners' expert, which was submitted in support of the motion to amend proposed Contention 2. *See id.* at 429-32. The Board found the declaration "fails to analyze

the Board denied the amendment request because it did not satisfy the requirements for contentions filed after the deadline set forth in 10 C.F.R. § 2.309(c)(1).

The Board turned next to the timely aspects of proposed Contention 2, which claimed that Holtec would not have sufficient funds to build, operate, and decommission the CISF because its funding plans depended on illegal contracts with DOE. The Board found that while Holtec would prefer that Congress change the law to permit a contract with DOE, Holtec would attempt to negotiate storage contracts with nuclear power plant owners.[212] The Board also found that Holtec would not begin construction until it has sufficient contracts established.[213] The Board determined that an evidentiary hearing on Holtec's intent would not be useful and found Joint Petitioners' proposed Contention 2 inadmissible for failure to raise a genuine dispute with the application.[214]

The Board further rejected Joint Petitioners' argument that Holtec must provide financial assurance for periods beyond the license term. Joint Petitioners argued that 10 C.F.R. § 72.22(e) requires that Holtec "must possess the necessary funds, have reasonable assurance

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any specific provision in Holtec's application" and included "virtually nothing that purports to relate directly to Holtec counsel's January 24, 2019 concession." *Id.* at 430.

212. *Id.* at 433.

213. *Id.*

214. *Id.*

of obtaining the necessary funds, or by a combination of the two, have the funds to undertake the CISF as a 20-year storage-construction program, *and to operate it securely for 100 years total.*"[215] The claim appeared again in Joint Petitioners' second motion to amend proposed Contention 2, which cited the AEA and our financial assurance regulations at 10 C.F.R. § 72.22(e) for the argument that "Holtec has not adequately estimated the operating costs over the planned life of the CISF."[216] The Board rejected the claim and noted that "Joint Petitioners' claims about financial assurances for later phases or for storage beyond the license term are . . . outside the scope of this proceeding" and thus, inadmissible.[217]

On appeal, Joint Petitioners argue that this ruling improperly "dispense[d] with full and thorough consideration of all aspects of the Holtec CISF plan under NEPA to a later time."[218] This NEPA argument is raised for the first time on appeal and is therefore untimely.[219] In addition, Joint Petitioners do not provide legal or factual support for this argument. Joint Petitioners cite no regulation, case, or other legal authority suggesting NEPA requires Holtec to provide more financial assurance information than it did nor do they point to any part of

215. Joint Petitioners Petition at 34 (emphasis added).

216. Joint Petitioners Second Motion to Amend, Encl. at 10-11.

217. LBP-19-4, 89 NRC at 432.

218. Joint Petitioners Appeal at 22.

219. *See Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 (1996).

Holtec's ER as inadequate. In fact, Holtec's ER includes an analysis of the environmental effects expected from all twenty phases of its planned CISF activities, which undercuts Joint Petitioners' argument that dismissal of proposed Contention 2 improperly avoids consideration of reasonably foreseeable environmental impacts associated with potential future phases of the CISF project.[220]

Our Part 72 regulations govern the financial assurance information Holtec must include in its CISF application. Holtec must provide "information sufficient to demonstrate to the Commission the financial qualification of the applicant to carry out . . . the activities for which the license is sought."[221] The Board found that Holtec had provided financial assurance information for the first phase of the CISF project—the phase involving "activities for which the license is sought"—and that the information was not genuinely disputed by proposed Contention 2.[222]

While Holtec anticipates that there may be future, additional phases of its project, each phase would require a license amendment. Any application to amend the license to expand the capacity or extend the term of the license would in turn require updated financial assurance information. We therefore affirm the Board's dismissal of proposed Contention 2.

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220. *See* ER §§ 1.0, 4.0.

221. 10 C.F.R. § 72.22(e).

222. *Id.*

3. Joint Petitioners Contention 3: Underestimation of Low-Level Radioactive Waste Volume

Joint Petitioners' proposed Contention 3 asserted that Holtec's ER provides "a seriously inaccurate picture of the true costs of constructing, operating, and decommissioning" the proposed CISF because it grossly underestimates the amount of low-level radioactive waste (LLRW) that the project will generate.[223] Specifically, proposed Contention 3 alleged the ER was deficient because it does not consider that the tons of concrete used at the site for foundations and casks will become "radioactively activated" and that "replacement of the canisters themselves during the operational life of the CISF" will generate LLRW.[224]

In response to proposed Contention 3, both the Staff and Holtec argued that Joint Petitioners had not offered any specific facts or expert opinion to support the contention. Holtec explained that the storage casks and pads are not expected to have any residual radioactive contamination because (a) the spent nuclear fuel canisters will remain sealed while in the CISF; (b) the canisters will be surveyed at the originating reactor and again when they arrive at the CISF to ensure that there is no radiological contamination; and (c) the neutron flux levels generated by the spent nuclear fuel would be so low that any activation of the storage casks and pads would

223. Joint Petitioners Petition at 36-37.

224. *Id.* at 36.

produce negligible radioactivity.[225] The Staff argued that the Joint Petitioners had offered no facts or expert opinion to support their "claims that millions of tons of material will be activated" and become LLRW.[226] With respect to the canisters, Holtec pointed out that the packaged canisters will be delivered to Holtec's site, ready for storage, and that fuel will be transported off-site in the same canister when a repository becomes available, such that no canisters would be opened at the facility.[227] The Board agreed with Holtec and the Staff and rejected proposed Contention 3 because Joint Petitioners had not met their burden in proffering facts or expert opinion supporting their claims.[228]

The Board also found that Holtec had addressed the impacts from spent fuel repackaging and cask disposal by appropriately relying on the description of those

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225. Holtec International's Answer Opposing the Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Study Group Petition to Intervene and Request for an Adjudicatory Hearing on Holtec International's HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2018), at 41 (Holtec Answer to Joint Petitioners) (citing ER § 4.12.2).

226. Staff Consolidated Response at 36.

227. Holtec Answer to Joint Petitioners at 41 (citing ER § 4.12.2). *See also* ER § 4.12.4 (stating that all canisters of SNF would be removed and transported to a permanent repository prior to decontamination and decommissioning of the facility).

228. LBP-19-4, 89 NRC at 434.

impacts contained in the Continued Storage GEIS, which is incorporated by reference into 10 C.F.R. § 51.23.[229] Holtec referred to the Continued Storage GEIS in its discussion of environmental impacts of decontamination and decommissioning.[230] The Continued Storage GEIS found that the potential environmental impacts from LLRW from decommissioning a large scale ISFSI after long term storage would be "small."[231] The Board therefore found that aspects of proposed Contention 3 dealing with "the topics of repackaging of spent fuel and disposal of the spent fuel casks after repackaging" were an impermissible attack on the NRC's regulations under 10 C.F.R. § 2.335, because they challenged the adequacy of ISFSI decommissioning analyses contained in the Continued Storage GEIS.[232]

On appeal, Joint Petitioners assert there exists "evidence of significant volumes of unremediable concrete, soil and canisters," but do not point to any specific evidence.[233] Joint Petitioners claim that during oral argument on contention admissibility the Board unreasonably "required [Joint Petitioners] to explain why [the concrete] cannot all be decontaminated."[234] But

229. *Id.* at 435 (citing Continued Storage GEIS at 5-48).

230. *See* ER § 4.9.5.

231. *See* Continued Storage GEIS at 5-48.

232. LBP-19-4, 89 NRC at 435.

233. Joint Petitioners Appeal at 23.

234. *Id.*

it does not appear to us that the Board imposed an undue burden on the Joint Petitioners. Rather, the Board asked whether Joint Petitioners had any factual support for their assertions that concrete at the CISF would become activated or that concrete decontamination would not be possible.[235] In response, counsel for Joint Petitioners offered only "common sense" as an explanation for how concrete would become radioactive and took no position on whether decontamination of concrete would be possible.[236] The Board reasonably found that these unsupported assertions were insufficient to support an admissible contention.

Joint Petitioners further argue that the Board erred in relying on the Continued Storage Rule because the rule "does not alter any requirements to consider environmental impacts of spent fuel storage during the term . . . of a license for an ISFSI in an ISFSI licensing proceeding."[237] However, with respect to the environmental effects during the life of the CISF, the Board found that Joint Petitioners had not proffered any evidentiary support for their claim that the concrete pads and casks will become contaminated or for their claim that the canisters will need to be replaced during the operating life of the

235. Tr. at 161-62; *see* 10 C.F.R. § 2.309(f)(5).

236. Tr. at 161-62. In answering the Board's questions, counsel for Joint Petitioners stated that it is arguing that "the initial quantification [of LLRW] is tremendously off base," but provided no factual or expert support for that assertion. *Id.*

237. Joint Petitioners Appeal at 24.

facility.[238] The portion of the Continued Storage GEIS that the Board discusses refers to the expected consequences of temporary storage in an large scale ISFSI—a facility like the proposed facility—and found that the expected consequences of replacing concrete pads, casks, canisters and the DTS would be small.[239] Therefore, even assuming these materials did need to be replaced during the life of the proposed facility, the impacts have been studied and set forth in the Continued Storage GEIS, which are codified in the Continued Storage Rule. Joint Petitioners' appeal provides no basis to overturn those Board findings.

In short, the Board found proposed Contention 3 failed to include support for its assertions of inadequacy regarding Holtec's evaluation of LLRW impacts. Joint Petitioners' appeal does not dispute the Board's finding that the contention lacked evidentiary support. Accordingly, we affirm the Board's rejection of proposed Contention 3.

4. Joint Petitioners Contention 4: Holtec Does Not Qualify for Continued Storage GEIS Presumptions

Joint Petitioners argued in proposed Contention 4 that Holtec cannot rely on the Continued Storage GEIS's generic environmental analysis of transportation and operational accidents because the proposed CISF differs from the type of facilities contemplated by the Continued

238. LBP-19-4, 89 NRC at 434.

239. *Id.* at 435 (citing Continued Storage GEIS at 5-48).

Storage GEIS, particularly with respect to its lack of a DTS.[240] The Board dismissed proposed Contention 4, ruling that Holtec's ER does not rely on the Continued Storage GEIS to avoid discussion of site-specific accidents but rather "contains a site-specific impact analysis for the period of the proposed activity" as the GEIS anticipates.[241] The Board further found that "[n]either the Continued Storage GEIS nor NRC regulations require an analysis of a [DTS] at this time"; therefore, proposed Contention 4 failed to raise a genuine dispute with the application on a material issue of law or fact.[242]

On appeal, Joint Petitioners do not dispute the Board's finding that Holtec's ER addresses site-specific environmental effects (including effects from transportation and operational accidents) during the period of expected facility construction and operation; rather, they continue to argue that the CISF must have a DTS during the current license period. Joint Petitioners argue that "Holtec cannot consider the probability of leaking or contaminated canisters or casks arriving at the CISF to be zero; it cannot discount the need for a DTS well before the end of the first 100 years of operations

240. Joint Petitioners Petition at 46-49. Joint Petitioners provided three other bases for Contention 4, each of which the Board addressed in denying its admission. *See* LBP-19-4, 89 NRC at 437. Joint Petitioners raise none of those three bases on appeal. *See* Joint Petitioners Appeal at 24-25.

241. LBP-19-4, 89 NRC at 437.

242. *Id.*

for emergencies, remediation and repackaging."[243] Joint Petitioners assert the Board's dismissal of proposed Contention 4 was wrong because "the ASLB may not segment consideration of environmental effects," and "Holtec may not avoid NEPA or AEA . . . scrutiny of its decision to not have a [DTS] available before the end of the first 100 years of operation because of the Continued Storage GEIS."[244]

The Continued Storage GEIS generically analyzes the environmental impacts of spent fuel storage after the operational life of a reactor or ISFSI in the short-term (60 years after cessation of operations), long-term (60 to 100 years), and indefinite timeframes.[245] It generically assumes that a DTS would be built "in the long-term and indefinite timeframes," which occur beyond the initial 40-year license term for the Holtec CISF, so that "the environmental impacts of constructing a reference DTS" can be considered, thus providing a "complete picture of the environmental impacts of continued storage."[246] But as the Board correctly held, this assumption does not impose a requirement that any particular facility build a DTS.

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243. Joint Petitioners Appeal at 25.

244. Joint Petitioners Appeal at 24. Joint Petitioners' argument regarding NEPA segmentation is new on appeal and will not, therefore, be considered. *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006).

245. Continued Storage GEIS § 1.8.2.

246. *Id.* § 2.1.4.

We agree with the Board that if the proposed CISF is licensed, built, and operated and Holtec later decides to construct and operate a DTS, a separate licensing action would be required, which would entail additional environmental review.[247] For now, Holtec has evaluated the site-specific environmental effects associated with the construction and operation of the proposed CISF (as required by the Continued Storage Rule). Joint Petitioners do not challenge that facility- and site-specific evaluation of the effects of transportation and operational accidents.[248] We thus find no error in the Board's conclusion that proposed Contention 4 stated no genuine dispute with the application and was therefore inadmissible.

5. Joint Petitioners Contention 7: Holtec's "Start Clean/Stay Clean" Policy Is Unlawful and Directly Causes a Public Health Threat

In their proposed Contention 7, Joint Petitioners argued that Holtec's "start clean/stay clean" policy is illegal and unsafe because "leaky and/or contaminated canisters" might arrive at the proposed CISF, which Holtec "intends to return . . . to their points of origin," thus risking "immediate danger to the corridor communities

247. LBP-19-4, 89 NRC at 437.

248. *See* ER §§ 4.9.3.2, 4.13.2. Holtec assumes for purposes of its environmental analysis that "[spent nuclear fuel] could be stored at the CIS Facility for approximately 120 years (40 years for initial licensing plus 80 years for life extensions)," which "could be reduced if a final geologic repository is licensed and operated . . . ". ER § 1.0.

through which they would travel back to their nuclear power plant or site of origin, likely violating numerous additional NRC and DOT regulations."[249]

Holtec's answer explained that its "start clean/stay clean" plan would mean that a defective canister would be shipped back in an approved transportation cask, which is lawful as long as applicable radiation standards are met.[250] Holtec also pointed to our decision in *Private Fuel Storage*, wherein we noted that a similar contention's "assertion that shipping [a defective] canister back inside the approved transportation casks is not safe can be seen as an impermissible attack on NRC regulations and rulemaking-related generic determinations that the transportation cask is sufficient to prevent the leakage of any radioactive material."[251]

The Board found the contention lacked factual or expert support, specifically finding that Joint Petitioners had not shown:

> (1) how the spent fuel, when packaged at the reactor site, would leave the site leaking or damaged notwithstanding NRC-approved quality assurance programs; (2) how the spent fuel canister, within its transport overpack

249. Joint Petitioners Petition at 61.

250. Holtec Answer to Joint Petitioners at 63-64 (citing 10 C.F.R. § 71.47).

251. *Id.* at 63 (citing *Private Fuel Storage*, CLI-04-22, 60 NRC at 138 n.53).

> cask, would become credibly damaged in an accident scenario that results in an exceedance of dose rates while in transit; and (3) how the sequestration sleeve, as outlined in Holtec's SAR at the time the petitions were due in this proceeding, is an inadequate remedy should the cask and canister somehow become damaged.[252]

The Board agreed that our decision in *Private Fuel Storage* would require the proponent of a similar contention to posit a credible scenario where a canister is breached in transport.[253]

On appeal, Joint Petitioners attempt to distinguish *Private Fuel Storage* by suggesting that accidental canister breaches should be considered credible in this case because Holtec's "start clean/stay clean" policy necessarily supposes some breaches will occur.[254] The Board already considered and rejected that argument, however, noting that *Private Fuel Storage* (like this case) also involved a policy "to ship back a leaking or defective canister to its point of origin," and that the petitioner in that case (like this case) had failed to contest "those very programs that provide that a transportation accident or breach of canister is not credible."[255]

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252. LBP-19-4, 89 NRC at 444.

253. *Id.* (citing *Private Fuel Storage*, CLI-04-22, 60 NRC at 136-37).

254. Joint Petitioners Appeal at 26.

255. LBP-19-4, 89 NRC at 444.

We find that the Board appropriately relied on Private Fuel Storage in finding this contention inadmissible. Mere existence of Holtec's "start clean/stay clean" policy is not sufficient to undermine the requirements and safety analyses that have generically established the integrity of approved spent fuel canister designs.

6. Joint Petitioners Contention 9: Incomplete and Inadequate Disclosure of Transportation Routes

Joint Petitioners argued in proposed Contention 9 that Holtec should disclose the transportation routes for the thousands of cask deliveries that are anticipated over the first twenty years of Holtec's proposed license.[256] According to Joint Petitioners, the application only shows two probable routes, one from the site of the former Maine Yankee plant and another from the former San Onofre Nuclear Generating Station in California.[257] Joint Petitioners argued that complete transportation information is necessary for their own participation in the NEPA process as well as for emergency response officials to understand the scope of Holtec's proposal.[258]

The Board found that Joint Petitioners failed to raise a genuine dispute with the application because they did not demonstrate that either NEPA or our regulations

256. Joint Petitioners Petition at 66-68.

257. *Id.* at 66.

258. *Id.* at 67.

require a specific assessment of possible transportation routes.[259] The Board found that Holtec's ER evaluated three representative routes—one from San Onofre to the proposed CISF, one from Maine Yankee to the proposed CISF, and one from the proposed CISF to Yucca Mountain—and that "the use of representative routes is in keeping with past NRC practice to evaluate transportation impacts."[260] The Board further found Joint Petitioners' concerns that emergency response officials would need disclosure of transportation routes to be outside the scope of this licensing proceeding. The Board explained that the NRC reviews and approves spent nuclear fuel transportation routes separately, in conjunction with the Department of Transportation, including consultation with applicable States or Tribes, and coordination with local law enforcement and emergency responders.[261]

On appeal, Joint Petitioners largely repeat their arguments before the Board.[262] However, the Board

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259. LBP-19-4, 89 NRC at 445.

260. *Id.* at 446 (citing Continued Storage GEIS at 5-49 to 5-54; Private Fuel Storage EIS at 5-39; 10 C.F.R. § 51.52, tbl. S-4).

261. *Id.*; *see also* 10 C.F.R. §§ 71.97, 73.37 (requiring advanced planning and coordination of spent fuel shipments with State and Tribal officials).

262. Joint Petitioners Appeal at 27. Joint Petitioners also raise a new argument on appeal that the Board's ruling effectively "segments a single project into smaller projects" by "[s]eparating consideration of the transportation component from the storage component," and thus "defies effective analysis and public understanding as required by NEPA." *Id.* That argument, which does not account for

correctly found that determining exact transportation routes is an issue outside the scope of this licensing proceeding. Furthermore, the use of representative routes in an environmental-impacts analysis to address the uncertainty of actual, future spent fuel transportation routes is a well-established regulatory approach, the foundations of which Joint Petitioners have not challenged.[263] Therefore, we affirm the Board's decision to deny admission of proposed Contention 9.

7. Joint Petitioners Contention 11: NEPA Requires Significant Security Risk Analysis

Joint Petitioners asserted in proposed Contention 11 that Holtec's application should include an analysis of the environmental impacts resulting from a terrorist attack on the proposed CISF and on spent nuclear fuel shipments to the CISF.[264] The Board found the contention

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the evaluation of transportation impacts contained in ER section 4.9, is raised for the first time on appeal and therefore will not be considered. *See South Carolina Electric & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 5 (2010).

263. *See*, *e.g.*, Continued Storage GEIS § 5.16 (evaluating impacts of spent fuel transportation to an away-from-reactor ISFSI based on shipments over a representative route); Private Fuel Storage EIS § 5.7.2 (selecting one of the longest possible routes passing through some of the most populated regions of the country).

264. Joint Petitioners Petition at 70-88. Proposed Contention 11 included twenty-eight "sub-contentions" that the Board found "[fell] short of the Commission's contention admissibility standards." LBP-19-4, 89 NRC 448-49. Joint Petitioners did not appeal that ruling.

inadmissible based on the policy decision we expressed in *AmerGen Energy*, which was upheld by the United States Court of Appeals for the Third Circuit.[265] In *AmerGen Energy*, we held that terrorist attacks are too far removed from the natural or expected consequences of agency action to require environmental analysis in an NRC licensing proceeding.[266] In *AmerGen Energy*, we specifically declined to follow a contrary ruling from the United States Court of Appeals for the Ninth Circuit for any facility located outside that Circuit.[267]

The Board found that because the proposed CISF would be in New Mexico, which is not within the Ninth Circuit, no terrorist analysis under NEPA is required.[268]

On appeal, Joint Petitioners reassert that "the ER should contain an analysis of terrorist attacks as an environmental impact" and cite the Ninth Circuit's decision that we declined to follow in *AmerGen Energy.*[269] But Joint Petitioners do not articulate a reason for us to

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265. LBP-19-4, 89 NRC 448; *see AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007), *review denied, N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009).

266. *AmerGen Energy*, CLI-07-8, 65 NRC at 129.

267. *Id.* at 128-29 (declining to follow *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)).

268. LBP-19-4, 89 NRC at 448 (observing that New Mexico is in the Tenth Circuit).

269. Joint Petitioners Appeal at 28.

reconsider our policy here. The Board correctly applied our prior rulings, and we affirm its decision to deny admission of proposed Contention 11.

F. Fasken Motion to Admit New Contention

On August 1, 2019, Fasken filed a motion for leave to file a new contention claiming that Holtec does not control mineral rights beneath the proposed site as represented in its application.[270] Fasken bases its contention on a June 19, 2019, letter from the State of New Mexico Commissioner of Public Lands to Krishna Singh, President and CEO of Holtec, a copy of which was sent to NRC and served on the parties in this proceeding on July 2, 2019.[271] Both the Staff and Holtec opposed the motion on various grounds, including that Fasken had failed to file a motion to reopen the proceeding or address the standards for doing so.[272] Thereafter, Fasken filed a motion to reopen, but it

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270. Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to File a New Contention (Aug. 1, 2019) (Fasken Motion for New Contention).

271. Letter from Stephanie Richard, New Mexico Public Lands Commissioner, to Krishna Singh, President of Holtec International (June 19, 2019) (ML19183A429) (attached to Fasken Motion for New Contention as Ex. 5) (New Mexico Letter).

272. *See* NRC Staff Answer in Opposition to Fasken Oil and Ranch, Ltd. and Permian Basin Land and Royalty Owners' Motion to File New Contention (Aug. 26, 2019), at 9-10 (Staff New Contention Response); Holtec International's Answer Opposing Fasken's Late-Filed Motion to File a New Contention (Aug. 26, 2019), at 12-13 (Holtec New Contention Response).

subsequently withdrew that motion without withdrawing its initial motion for leave to admit a new contention.[273]

Although we could determine the admissibility of Fasken's new proposed contention ourselves, we decline to do so in this instance. The Board is the agency's expert in contention admissibility, and typically, the parties have the opportunity for oral argument before the Board on matters of contention admissibility. We therefore remand the contention to the Board for consideration of the contention's admissibility, timeliness, and capacity to meet the reopening standards.

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273. *See* Fasken Oil and Ranch and Permian Basin Land and Royalty Owners Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 3, 2019); Fasken and PBLRO's Withdrawal of Their "Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019" (Sept. 12, 2019); Holtec International's Answer Opposing Fasken's Motion for Leave to Reopen and Incorporate Contention Filed August 1, 2019 (Sept. 13, 2019).

III. CONCLUSION

For the foregoing reasons, we *affirm in part* and *reverse* and *remand in part* the Board's ruling denying the petitions. We further *remand* to the Board Fasken's new proposed contention and Sierra Club Contention 30 for determination of their admissibility.

IT IS SO ORDERED.

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland, this 23d day of April 2020.

Appendix D

CHAIRMAN SVINICKI, DISSENTING IN PART

I join my colleagues' disposition of the many appeals in this proceeding with one exception: the majority's decision to remand portions of Sierra Club's Contentions 15, 16, 17, and 19 (the "groundwater contentions"). Generally, these contentions asserted that Holtec inadequately characterized groundwater on site and therefore the environmental impacts could be greater than acknowledged should the storage canisters become compromised and contaminate the groundwater.[1] However, the Board concluded that challenges to the integrity of the storage canisters effectively sought to litigate our regulations certifying the designs of those canisters and were therefore outside the scope of this proceeding.[2] The majority does not disturb this finding, but instead remands the limited question of whether these contentions could stand as challenges to Holtec's site groundwater characterization on their own.[3]

In my view, the Board correctly dismissed the entirety of the groundwater contentions upon concluding that Sierra Club's claim that the canisters could leak was inadmissible. Without that component, the groundwater contentions no longer challenge the discussion of environmental impacts in the application and therefore fail

1. Sierra Club Petition at 60-67.

2. LBP-19-4, 89 NRC at 404-05.

3. Order at 29.

to raise a material, genuine dispute with the application.[4] While I would certainly disagree with an open-ended remand to the Board on this issue, here the majority has instead focused this remand on the material (although in my view already resolved) issue of whether the challenges to groundwater characterization could impact the analysis of environmental impacts in this proceeding. On balance, however, I find even this narrow remand to be an exercise in elevating form over substance.

4. 10 C.F.R. § 2.309(f)(1)(iv), (vi).

APPENDIX E — MEMORANDUM AND ORDER OF THE NUCLEAR REGULATORY COMMISSION, FILED MAY 7, 2019

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF HOLTEC INTERNATIONAL
(HI-STORE Consolidated Interim Storage Facility)

Atomic Safety and Licensing Board
LBP-19-4
Docket No. 72-1051-ISFSI
(ASLBP No. 18-958-01-ISFSI-BD01)

May 7, 2019

Before Administrative Judges: Paul S. Ryerson, Chairman; Nicholas G. Trikouros; Dr. Gary S. Arnold

MEMORANDUM AND ORDER

(Ruling on Petitions for Intervention and Requests for Hearing)

Before the Board are six petitions to intervene and requests for a hearing concerning a license application by Holtec International (Holtec) to construct and operate a consolidated interim storage facility for spent nuclear fuel in Lea County, New Mexico. The petitioners are: (1) Beyond Nuclear, Inc. (Beyond Nuclear); (2) Sierra Club; (3) Don't Waste Michigan, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Studies Group (collectively,

Joint Petitioners); (4) Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken); (5) Alliance for Environmental Strategies (AFES); and (6) NAC International Inc. (NAC).

Because Holtec has revised its license application in response to petitioners' initial contentions, both the Board's and the NRC Staff's views as to their admissibility have changed over time. It appears the NRC Staff now asserts that two of the six hearing requests should be granted because, in its view (1) Beyond Nuclear has demonstrated standing and its only proffered contention is admissible; and (2) Sierra Club has demonstrated standing and has proffered two admissible contentions (Sierra Club Contentions 1 and 4).[1] Holtec opposes the standing of all six petitioners and asserts that none of their proffered contentions is admissible.

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1. *See* NRC Staff 's Consolidated Response to Petitions to Intervene and Requests for Hearing Filed by [AFES], [Beyond Nuclear], [Joint Petitioners], [NAC], and the Sierra Club (Oct. 9, 2018) at 65-67, 72-74 [hereinafter NRC Staff Consol. Answer]; NRC Staff Answer to Motions to Amend Contentions Regarding Federal Ownership of Spent Fuel (Feb. 19, 2019) [hereinafter NRC Staff Answer to Beyond Nuclear and Fasken Motion]. *But see* Tr. at 331-35 (NRC Staff stating at oral argument that issues identified in Beyond Nuclear's contention and in Sierra Club Contention 1 appeared "to have been cured for the present time"). Initially, the Staff also deemed Sierra Club Contention 8 to be admissible (NRC Staff Consol. Answer at 79), but announced at oral argument that it no longer was taking a position on the admissibility of that contention. Tr. at 261.

The Board concludes that Beyond Nuclear, Sierra Club, and Fasken have demonstrated standing. However, the Board denies Beyond Nuclear's petition, because its sole contention no longer identifies a genuine dispute with Holtec's license application. Likewise, neither Sierra Club nor Fasken has proffered an admissible contention and their petitions are therefore denied. Although the Board does not rule on its standing, AFES has not proffered an admissible contention and its petition is denied for that reason. Joint Petitioners and NAC have neither demonstrated standing nor proffered an admissible contention. Because no petitioner has both demonstrated standing and proffered an admissible contention, this proceeding is terminated.

I. BACKGROUND

The nation's growing inventory of spent nuclear fuel from commercial nuclear power reactors is generally stored at the reactor sites where it was generated, initially immersed in pools of water and then, after a suitable delay, encased in protective dry-cask storage systems.[2] What to do with the spent fuel "has vexed scientists, Congress, and regulatory agencies for the last half-century."[3] After rejecting early disposal proposals that ranged from

2. U.S. Gov't Accountability Off., GAO-17-340, Commercial Nuclear Waste: Resuming Licensing of the Yucca Mountain Repository Would Require Rebuilding Capacity at DOE and NRC, Among Other Key Steps at 1 (2017).

3. *Nuclear Energy Inst. v. EPA*, 373 F.3d 1251, 1257 (D.C. Cir. 2004).

"burying nuclear waste in polar ice caps to rocketing it to the sun," a consensus appeared to settle on deep geologic burial in a permanent repository.[4] Congress passed the Nuclear Waste Policy Act of 1982 (NWPA),[5] which ultimately led the U.S. Department of Energy (DOE) to submit an application to the NRC for authorization to construct a geologic repository at Yucca Mountain, Nevada.[6] However, shortly after DOE's application was submitted in June 2008, Congress stopped funding the Yucca Mountain project, and a pending adjudication before an NRC licensing board was suspended in September 2011.[7] To date, more than seven years later, Congress has provided no new funding for a permanent nuclear waste repository at Yucca Mountain.

The Holtec proposal before the Board is not for another permanent repository, but for what is acknowledged by its very name to be a temporary solution: a consolidated interim storage facility (CISF). While a license to construct and operate Yucca Mountain would have required DOE to demonstrate a reasonable expectation that it would

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4. *Id.*

5. Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 (1983) [hereinafter NWPA].

6. *See* Letter from Edward F. Sproat III, Director, DOE Office of Civilian Radioactive Waste Management, to Michael F. Weber, Director, NRC Office of Nuclear Material Safety and Safeguards (NMSS) (June 3, 2008) (ADAMS Accession No. ML081560407).

7. *U.S. Department of Energy* (High-Level Waste Repository), LBP-11-24, 74 NRC 368 (2011).

meet specified performance standards throughout the "period of geologic stability," defined to "end 1 million years after disposal,"[8] the licensing requirements for an interim storage facility under 10 C.F.R. Part 72 apply to renewable terms of no more than "40 years from the date of issuance."[9] On March 30, 2017, Holtec submitted an application to the NRC to construct and operate a CISF.[10] Holtec intends to construct and operate the first phase of its CISF on approximately 1,000 acres of land in Lea County, New Mexico.[11] Holtec seeks to store 8,680 metric tons of uranium (MTUs) in two different models of Holtec canisters, up to 500 canisters in total, for a license period of 40 years.[12] On March 19, 2018, the NRC accepted and docketed Holtec's application.[13] If its initial license is granted, Holtec plans "19 subsequent expansion phases

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8. 10 C.F.R. § 63.302.

9. *Id.* § 72.42(a).

10. *See* Letter from Kimberly Manzione, Holtec Licensing Manager, to Michael Layton, Director, NRC Division of Spent Fuel Management, NMSS (Mar. 30, 2017) (ADAMS Accession No. ML17115A418).

11. [Holtec] HI-STORE [CISF] Environmental Report, at 14 (rev. 5 Mar. 2019) [hereinafter ER]. The petitioners' originally-filed contentions in this proceeding are based on the earlier version of Holtec's Environmental Report. *See* [Holtec] HI-STORE [CISF] Environmental Report (rev. 1 Dec. 2017).

12. *See* ER at 14.

13. *See* Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 12,034 (Mar. 19, 2018).

to be completed over the course of 20 years," with each phase necessitating a license amendment request.[14]

Holtec's Environmental and Safety Analysis Reports demonstrate marked differences between its proposed facility and a permanent waste repository, such as Yucca Mountain. Holtec's project is substantially less ambitious. For example, Yucca Mountain was to be constructed to comply with performance standards for one million years, but Holtec's Environmental Report anticipates storage at its proposed facility for 120 years (40 years for initial licensing, plus 80 years of potential extensions), and acknowledges that this 120 year period could be reduced if a permanent geologic repository were finally licensed and began operating.[15] While Yucca Mountain was statutorily authorized to store 70,000 metric tons of high-level radioactive waste,[16] Holtec's initial license application requests permission to store up to 8,680 MTUs.[17] While the Yucca Mountain repository would be constructed at least 700 feet below the surface,[18] Holtec's

14. ER at 14.

15. *Id.*

16. 42 U.S.C. § 10134(d).

17. ER at 14. Holtec's Environmental Report, however, analyzes the potential full 20-phase capacity of up to 100,000 MTUs.

18. U.S. DOE, Office of Civilian Radioactive Waste Management, Final Supplemental 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 at S-7 (June 2008).

license application contemplates a maximum excavation depth of 25 feet.[19] And all parts of the Holtec storage system—both for transportation and storage—would use canisters and casks that have been separately approved by the NRC, and hence are not part of Holtec's license application for the Lea County storage facility.[20]

On July 16, 2018, the NRC published notice in the *Federal Register* of an opportunity to request a hearing and petition to intervene by September 14, 2018.[21] On September 12, 2018, AFES filed its petition to intervene and request for a hearing.[22] On September 14, 2018, NAC, Joint Petitioners, Beyond Nuclear, and Sierra Club timely filed their petitions.[23] The NRC also received five

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19. [Holtec] HI-STORE [CISF] Safety Analysis Report at 30 (rev. 0F Jan. 2019) [hereinafter SAR]. The petitioners' originally-filed contentions in this proceeding are based on the earlier version of Holtec's SAR. *See* [Holtec] HI-STORE [CISF] Safety Analysis Report (rev. 0A Oct. 2017).

20. *See* 10 C.F.R. § 72.214 (Certificate Number 1040). Holtec's license application proposes the exclusive use of the HI-STORM UMAX canister storage system.

21. Holtec International's HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919, 32,919 (July 16, 2018) [hereinafter Notice of Opportunity to Request a Hearing].

22. [AFES'] Petition to Intervene and Request for Hearing (Sept. 12, 2018) at 1 [hereinafter AFES Pet.].

23. Petition to Intervene and Request for Hearing of NAC International, Inc. (Sept. 14, 2018) [hereinafter NAC Pet.]; [Joint Petitioners'] Petition to Intervene and Request for an Adjudicatory

petitions from local governmental bodies to participate in the proceeding.[24]

On September 14, 2018, the Commission received motions to dismiss the proceeding from Beyond Nuclear and Fasken.[25] On September 24, 2018, Holtec and the NRC Staff filed answers opposing both motions to dismiss.[26]

Hearing (Sept. 14, 2018) [hereinafter Joint Pet'rs Pet.]; Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene (Sept. 14, 2018) [hereinafter Beyond Nuclear Pet.]; Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Sept. 14, 2018) [hereinafter Sierra Club Pet.].

24. Petition by Eddy-Lea Energy Alliance to Participate as an Interested Local Governmental Body (Sept. 4, 2018) [hereinafter ELEA Pet.]; Corrected Petition by the Board of Commissioners for Lea County, New Mexico to Participate as an Interested Local Governmental Body (Sept. 12, 2018) [hereinafter Lea Cty. Pet.]; Petition by the City of Carlsbad, New Mexico to Participate as an Interested Local Governmental Body (Sept. 12, 2018) [hereinafter Carlsbad Pet.]; Petition by the City of Hobbs to Participate as an Interested Local Governmental Body (Sept. 13, 2018) [hereinafter Hobbs Pet.]; Petition by Eddy County to Participate as an Interested Local Governmental Body (Sept. 13, 2018) [hereinafter Eddy Cty. Pet.].

25. Beyond Nuclear, Inc.'s Motion to Dismiss Licensing Proceedings for Hi-Store [CISF] and WCS [CISF] for Violation of the [NWPA] (Sept. 14, 2018) [hereinafter Beyond Nuclear Motion to Dismiss]; Motion of [Fasken] to Dismiss Licensing Proceedings for Hi-Store [CISF] and WCS [CISF] (Sept. 14, 2018) [hereinafter Fasken Motion to Dismiss].

26. [Holtec's] Answer Opposing Beyond Nuclear Motion to Dismiss Licensing Proceeding for HI-STORE [CISF] (Sept. 24,

Beyond Nuclear and Fasken filed replies.[27] Although the Secretary of the Commission denied both motions on procedural grounds,[28] it observed that Beyond Nuclear's concurrently-filed petition incorporated arguments by reference contained in its motion to dismiss.[29] The Secretary, therefore, referred both Beyond Nuclear's and Fasken's motions to the Board to be considered under 10 C.F.R. § 2.309.[30]

2018) [hereinafter Holtec Answer to Beyond Nuclear Motion to Dismiss]; [Holtec's] Answer Opposing [Fasken] Motion to Dismiss Licensing Proceeding for HI-STORE [CISF] (Sept. 24, 2018) [hereinafter Holtec Answer to Fasken Motion to Dismiss]; NRC Staff 's Response to Motions to Dismiss Licensing Proceedings (Sept. 24, 2018) [hereinafter NRC Staff Response to Motions to Dismiss].

27. Beyond Nuclear's Reply to [Holtec], and NRC Staff Responses to Beyond Nuclear's Motion to Dismiss (Sept. 28, 2018) [hereinafter Beyond Nuclear Reply on Motion to Dismiss]; Reply of Movants Fasken and PBLRO to Staff 's Response to Motions to Dismiss (Sept. 28, 2018) [hereinafter Fasken Reply to NRC Staff on Motion to Dismiss]; Reply of [Fasken] to [Holtec's] Response to Motion to Dismiss (Sept. 28, 2018) [hereinafter Fasken Reply to Holtec on Motion to Dismiss].

28. Order of the Secretary, [Holtec] (HI-STORE [CISF]) [and] Interim Storage Partners LLC (WCS [CISF]) Docket Nos. 72-1051 & 72-1050 (Oct. 29, 2018) (unpublished) [hereinafter Order Denying Motions to Dismiss].

29. *Id.* at 2.

30. *Id.* at 2-3. On December 27, 2018, Beyond Nuclear petitioned the United States Court of Appeals for the District of Columbia Circuit to review the Secretary's Order, which denied Beyond Nuclear's Motion to Dismiss and referred it as a petition

Appendix E

On October 9, 2018, Holtec[31] and the NRC Staff[32] filed answers to the petitions. Holtec opposed the standing of all petitioners and the admission of all contentions. The NRC Staff supported the standing of two petitioners (Beyond Nuclear and Sierra Club) and the admissibility of four of their contentions (Beyond Nuclear's sole contention and Sierra Club Contentions 1, 4, and 8).[33] On October 16, 2018,

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to this Board. That appeal remains pending, although Beyond Nuclear has requested it be held in abeyance pending the outcome of this proceeding. *See* Notice of Beyond Nuclear's Petition for Review of NRC Order in D.C. Circuit U.S. Court of Appeals, Docket Nos. 72-1050/1051 (Jan. 16, 2019).

31. [Holtec's] Answer Opposing [AFES'] Petition to Intervene and Request for Adjudicatory Hearing on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to AFES]; [Holtec's] Answer Opposing Beyond Nuclear's Hearing Request and Petition to Intervene on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to Beyond Nuclear]; [Holtec's] Answer Opposing [NAC's] Petition to Intervene and Request for Hearing on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to NAC]; [Holtec's] Answer Opposing Sierra Club's Petition to Intervene and Request for Adjudicatory Hearing on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to Sierra Club]; [Holtec's] Answer Opposing [Joint Petitioners'] Petition to Intervene and Request for an Adjudicatory Hearing on [Holtec's] HI-STORE [CISF] Application (Oct. 9, 2018) [hereinafter Holtec Answer to Joint Pet'rs].

32. NRC Staff Consol. Answer.

33. The NRC Staff also did not oppose the admissibility of NAC Contention 3, but deemed it to be moot inasmuch as the Staff opposed NAC's standing.

petitioners AFES, Beyond Nuclear, Joint Petitioners, NAC, and Sierra Club filed replies.[34] On December 3, 2018, Holtec and the NRC Staff filed supplemental responses opposing consideration of Fasken's motion to dismiss as a petition.[35] Fasken filed a reply on December 10, 2018.[36]

The Board heard oral argument on January 23 and 24, 2019 in Albuquerque, New Mexico. Numerous motions proffering new and amended contentions that were filed after oral argument are addressed *infra.*

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34. Consolidated Response by Petitioner [AFES] to Answers by [Holtec] and NRC Staff (Oct. 16, 2018) [hereinafter AFES Reply]; Beyond Nuclear's Reply to Oppositions to Hearing Request and Petition to Intervene (Oct. 16, 2018) [hereinafter Beyond Nuclear Reply]; Combined Reply of [Joint Petitioners] to Holtec and NRC Answers (Oct. 16, 2018) [hereinafter Joint Pet'rs Reply]; Reply in Support of Petition to Intervene and Request for Hearing of [NAC] (Oct. 16, 2018) [hereinafter NAC Reply]; Sierra Club's Reply to Answers Filed by [Holtec] and NRC Staff (Oct. 16, 2018) [hereinafter Sierra Club Reply].

35. [Holtec's] Answer Opposing [Fasken's] Motion/Petition to Intervene on [Holtec's] HI-STORE [CISF] Application (Dec. 3, 2018) [hereinafter Holtec Supplemental Answer to Fasken Motion to Dismiss]; NRC Staff 's Supplemental Response to Motion to Dismiss by [Fasken] (Dec. 3, 2018) [hereinafter NRC Staff Supplemental Answer to Fasken Motion to Dismiss].

36. Reply of [Fasken] to Holtec's Answer Opposing Movants' Motion to Dismiss/Petition to Intervene (Dec. 10, 2018) [hereinafter Fasken Reply to Holtec]; Reply of [Fasken] to NRC Staff 's Supplemental Response and Opposition to Motion to Dismiss (Dec. 10, 2018) [hereinafter Fasken Reply to NRC Staff].

II. STANDING ANALYSIS

In a licensing proceeding such as this, the NRC must grant a hearing "upon the request of any person whose interest may be affected by the proceeding."[37] However, to determine whether a petitioner has a sufficient interest, the Commission applies contemporaneous judicial concepts of standing.[38] Although the Commission instructs us to construe the petition in favor of the petitioner when we determine standing,[39] it is nonetheless each petitioner's burden to demonstrate that standing requirements are met.[40] As relevant here, a petitioner may satisfy this burden in one of three ways.

First, a petitioner may show traditional standing. This requires a showing that a person or organization has suffered or might suffer a concrete and particularized injury that is: (1) fairly traceable to the challenged action; (2) likely redressable by a favorable decision; and (3) arguably within the zone of interests protected by the

37. 42 U.S.C. § 2239(a)(1)(A).

38. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015).

39. *Id.*

40. *See Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-00-5, 51 NRC 90, 98 (2000). Section 2.309(d) of 10 C.F.R. specifies information that a petitioner should include in its petition to establish standing, but does not set the standard the Board must apply when deciding whether that information is sufficient.

governing statutes[41]—here primarily the Atomic Energy Act (AEA) and the National Environmental Policy Act (NEPA).[42]

Second, a petitioner may take advantage of proximity presumptions the Commission has created to simplify standing requirements for individuals who reside within, or have frequent contacts with, a geographic zone of potential harm. In proceedings that involve construction or operation of a nuclear power plant, the zone is deemed to be the area within a 50-mile radius of the site.[43] In other proceedings, such as this one, a "proximity plus" standard is applied on a "case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source."[44] The smaller the risk of offsite consequences, the closer a petitioner must be to be realistically threatened. Although the Commission has not established a clear standard, the relevant distance

41. *Calvert Cliffs 3 Nuclear Project, LLC, and UniStar Nuclear Operating Services, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

42. 42 U.S.C. §§ 2011-2297; *id.* §§ 4321-4347.

43. *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138-39 (2010).

44. *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 116-17 (1995). *See Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994) ("[A] presumption based on geographic proximity is not confined solely to Part 50 reactor licenses, but is also applicable to materials cases where the potential for offsite consequences is obvious.").

from a consolidated interim storage facility is likely less than 50 miles because such a storage facility "is essentially a passive structure rather than an operating facility, and . . . therefore [has] less chance of widespread radioactive release."[45] If no "obvious potential" for harm exists,[46] the petitioner has the "burden to show . . . specific and plausible means" for how the proposed action will affect them.[47] "[C]onclusory allegations about potential radiological harm" are not sufficient.[48]

Third, like most petitioners here, an organization may try to establish representational standing based on the standing of one or more individual members. To establish representational standing, an organization must: (1) show that the interests it seeks to protect are germane to its own purpose; (2) identify at least one member who qualifies for standing in his or her own right; (3) show that it is authorized by that member to request a hearing on his or her behalf; and (4) show that neither the claim asserted nor the relief requested requires an individual member's participation in the organization's legal action.[49]

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45. *Consumers Energy Co.* (Big Rock Point Independent Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007).

46. *See Sequoyah Fuels*, CLI-94-12, 40 NRC at 75 n.22.

47. *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

48. *Id.*

49. *Consumers Energy Co.* (Palisades Nuclear Plant), CLI-07-18, 65 NRC 399, 409 (2007).

Appendix E

A. Beyond Nuclear

Beyond Nuclear states that it is "a nonprofit, nonpartisan membership organization that aims to educate and activate the public about the connections between nuclear power and nuclear weapons and the need to abolish both to protect public health and safety, prevent environmental harms, and safeguard our future."[50] Of especial relevance, "Beyond Nuclear advocates for an end to the production of nuclear waste and for securing the existing reactor waste in hardened on-site storage until it can be permanently disposed of in a safe, sound, and suitable underground repository."[51]

Beyond Nuclear claims standing on several different theories,[52] but we need consider only one. Beyond Nuclear submits the declarations of several members who live near the proposed facility and authorize Beyond Nuclear to represent them.[53] One such member—Keli Hatley—lives with her husband and small children just one mile away from the proposed facility.[54] Indeed, Ms. Hatley's cattle currently range on the land where the facility would be constructed, and she rides there on horseback to manage

50. Beyond Nuclear Pet. at 2.

51. *Id.*

52. *See* Beyond Nuclear Pet. at 2-10.

53. *See id.*, Ex. 01, Decl. of Daniel C. Berry, III (Sept. 14. 2018); *id.*, Ex. 03, Decl. of Keli Hatley; *id.*, Ex. 05, Decl. Margo Smith.

54. *See id.*, Ex. 03, Decl. of Keli Hatley ¶ 3.

them.[55] If the storage facility is built, Ms. Hatley expects she would have to ride along its fence line.[56]

The NRC Staff does not oppose Beyond Nuclear's claim of standing,[57] and the Board agrees. Ms. Hatley's residence is well within the distance that has been found sufficient in other proceedings that involved even smaller spent fuel facilities.[58]

Holtec opposes Beyond Nuclear's standing[59] because, Holtec asserts, Beyond Nuclear's members have not provided "any plausible explanation of how radionuclides or radiation from inside sealed metal canisters emplaced

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55. *Id.* ¶ 5.

56. *Id.*

57. NRC Staff Consol. Answer at 8.

58. *See, e.g.*, *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 429 (2002) (ruling 17 miles sufficient and citing other NRC approvals of standing for petitioners within 10 miles of proposed spent fuel pool expansions); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29-31 (1999) (according standing to a petitioner 17 miles from spent fuel pool); *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454-55 (1988), *aff'd*, ALAB-893, 27 NRC 627 (1988) (conceding standing of individual living within 10 miles of spent fuel pools); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 28 (2000) (granting standing to individual with part-time residence located 10 miles from spent fuel pool).

59. Holtec Answer to Beyond Nuclear at 13-18.

below ground in steel and concrete storage vaults" could reach them.[60] But the purpose of proximity presumptions is to eliminate the need for such factual demonstrations: "When the presumption of having the requisite interest is applied, it becomes unnecessary to establish a causal relationship between the claimed injury and the requested action."[61]

If Ms. Hatley lacks standing to challenge the storage of much of the nation's spent nuclear fuel (potentially up to 100,000 metric tons) one mile from her home, one has difficulty imagining who would have standing. Indeed, at oral argument, Holtec's counsel declined to speculate whether *anyone* might have standing to challenge its proposed storage facility under Holtec's demanding interpretation of the requirements.[62]

Beyond Nuclear has demonstrated standing. However, because Beyond Nuclear has not proffered an admissible contention, as discussed *infra*, its request for an evidentiary hearing must nonetheless be denied.

B. Sierra Club

Sierra Club claims to be the oldest and largest environmental organization in the United States, and

60. *Id.* at 17.

61. *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 45 (1990); *see also Calvert Cliffs*, CLI-09-20, 70 NRC at 917 n.27.

62. Tr. at 272-73.

to be especially concerned about the environmental consequences of nuclear power and nuclear waste.[63] Like Beyond Nuclear, Sierra Club submits supporting declarations from several members who live in the vicinity of the proposed facility.[64] One member—Danny Berry—states that he lives less than 10 miles away and owns and operates a ranch just three miles away.[65]

As discussed *supra*, these distances are well within the limits that have been found to confer standing to challenge much smaller storage facilities, and the NRC Staff agrees that Sierra Club has established standing.[66] And again, we are not persuaded by Holtec's argument[67] that, even to commence a challenge, an individual who lives sufficiently close to a potentially massive facility for storing much of the nation's spent nuclear fuel must first demonstrate with specificity just how radiation might reach them.

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63. Tr. at 41.

64. *See* Sierra Club Pet., Decl. of Danny Berry; *id.*, Decl. of Danielle Marie Dyer; *id.*, Decl. of Deanna Maria Dyer; *id.*, Decl. of Gordon Wayne Dyer; *id.*, Decl. of Martha A. Singleterry.

65. *See* Sierra Club. Pet., Decl. of Danny Berry ¶ 3. Because Mr. Berry submitted similar declarations on behalf of both Sierra Club and Beyond Nuclear, we consider his declaration only in connection with the standing of Sierra Club. *See Big Rock Point ISFSI*, CLI-07-19, 65 NRC at 426 (explaining that "multiple representations might lead to confusion").

66. NRC Staff Consol. Answer at 8.

67. Holtec Answer to Sierra Club at 14-15.

Sierra Club has demonstrated standing. However, because Sierra Club has not proffered an admissible contention, as discussed *infra*, its request for an evidentiary hearing must nonetheless be denied.

C. Joint Petitioners

Joint Petitioners are comprised of seven different organizations, each presenting a similar standing issue.[68] Although Public Citizen, Inc. and the Nuclear Issues Study Group have each submitted a declaration from a member who lives in New Mexico, neither lives anywhere near the proposed facility.[69] The other five organizations rely entirely on declarations from members who live in other states. All seven organizations, therefore, base their standing claims not on their members' proximity to the proposed facility, but on their proximity to potential transportation routes by which spent nuclear fuel might travel to the proposed facility.

This is too remote and speculative an interest on which to establish standing. As the Commission stated

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68. The seven organizations are: Don't Waste Michigan; Citizens for Alternatives to Chemical Contamination; Public Citizen, Inc.; San Luis Obispo Mothers for Peace; Nuclear Energy Information Service; Citizens' Environmental Coalition; and Nuclear Issues Study Group.

69. Joint Pet'rs Pet., Decl. of Petuuche Gilbert. The Declaration of Petuuche Gilbert asserts that he is a member of Public Citizen, Inc. who lives in Pueblo of Acoma, New Mexico. *Id.*, Decl. of Leona Morgan. The declaration of Leona Morgan asserts that she is a member of the Nuclear Issues Study Group who lives in Albuquerque, New Mexico.

in 2004: "[M]ere geographical proximity to potential transportation routes is insufficient to confer standing."[70] Even before 2004, licensing boards rejected standing arguments based on proximity to likely transportation routes.[71] As the Commission observed in 2001, licensing boards have regularly declined to find that a mere increase in the traffic of radioactive materials near a petitioner's residence, without more, constitutes an injury traceable to a licensing decision "that primarily affects a site hundreds of miles away."[72]

Although Joint Petitioners cite one licensing board decision for the proposition that standing may be based

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70. *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 n.11 (2004) (quoting *Diablo Canyon ISFSI*, LBP-02-23, 56 NRC at 434). *See also EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 NRC 613, 623 (2011) (denying petitioners' standing claim for failing to show there would be any impact from the transport of radioactive materials to be imported).

71. *See*, *e.g.*, *Diablo Canyon ISFSI*, LBP-02-23, 56 NRC at 433-34; *Pathfinder*, LBP-90-3, 31 NRC at 43-44 (denying standing to petitioner who resided one mile from a likely transportation route and merely claimed that an accident along that route would cause an increased radiological dose); *accord Exxon Nuclear Co., Inc.* (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 NRC 518, 520 (1977) (finding that assertion of injury from spent fuel that would travel on railway track very near property was insufficient to establish standing).

72. *International Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-18, 54 NRC 27, 32 (2001).

on proximity to transportation routes,[73] we decline to follow it. In our view, either the result in *Duke Cogema* was influenced by what that Board characterized as the "unique circumstances"[74] surrounding transportation of mixed oxide fuel or, alternatively, the decision is simply an outlier that failed to anticipate the position of the Commission as expressed in later cases.[75] Regardless, it is not binding on this Board.

Moreover, other licensing boards have rejected petitioners' standing claims because the mere fact that additional radioactive waste will be transported if the NRC licenses a project "does not *ipso facto* establish that there is a reasonable opportunity for an accident to occur at [any location], or for the radioactive materials to escape because of accident or the nature of the substance being transported."[76] Here, although Joint Petitioners try to predict future transportation routes,[77] Holtec's proposed facility as yet has no customers, and the routes by which spent fuel might travel to Lea County, New Mexico from nuclear power plants around the country have not yet been established.[78] Joint Petitioners' standing claims

73. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001), *rev'd in part on other grounds*, CLI-02-24, 56 NRC 335 (2002).

74. *Id.* at 417.

75. *See supra* note 70.

76. *Pathfinder*, LBP-90-3, 31 NRC at 43.

77. Joint Pet'rs Pet. at 11-13.

78. Holtec Answer to Joint Pet'rs at 20.

are therefore even more speculative than the rejected claims of petitioners who could at least show a reasonable probability that the transportation routes they lived near would actually be used.[79]

None of the Joint Petitioners has demonstrated standing. Moreover, because Joint Petitioners have not proffered an admissible contention, as discussed *infra*, their request for an evidentiary hearing must be denied on that ground as well.

D. Fasken

As set forth in the Declarations of Tommy E. Taylor,[80] Mr. Taylor is Vice President of Fasken Management, LLC,

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79. *Cf. International Uranium (USA) Corp.* (White Mesa Uranium Mill), LBP-01-8, 53 NRC 204, *aff'd*, CLI-01-18, 54 NRC 27 (2001) (denying standing where petitioner resided merely one block from route over which applicant proposed to transport radioactive materials); *Pathfinder*, LBP-90-3, 31 NRC at 43-44 (denying standing to petitioner who resided one mile from transportation route established with "reasonable likelihood").

80. Mr. Taylor executed his initial Declaration on September 14, 2018. He executed a Supplemental Declaration on December 10, 2018, which was submitted with a motion of the same date, seeking permission to file it. The Commission allows a petitioner "some latitude to supplement or cure a standing showing in its reply pleading [so long as] any additional arguments [are] supported by . . . a supplemental affidavit." *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), LBP-12-3, 75 NRC 164, 186 (2012) (citing *South Carolina Electric & Gas Co. and South Carolina Public Service Authority* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010)). Accordingly, the Board grants the motion and accepts Mr. Taylor's Supplemental Declaration.

which is the general partner of Fasken Land and Minerals, Ltd.[81] Fasken is a member of the Permian Basin Land and Royalty Organization, which is an association of oil and gas producers and royalty owners formed specifically in response to Holtec's proposed facility.[82]

As stated in Mr. Taylor's initial Declaration, Fasken owns and/or leases property related to its oil and gas activities that is approximately two miles from the proposed Holtec site.[83] Although Mr. Taylor's initial Declaration focused on Fasken's economic interests, his supplemental Declaration clarified that he and other Fasken employees "routinely" go to this area for work-related purposes, such as checking on oil and gas production equipment, regular inspection and maintenance, and repairs as needed.[84] Accordingly, he is "concerned that the close proximity of Fasken's oil and gas properties and the necessity for Fasken's employees and myself to regularly attend to such will expose them and myself to radiation from the proposed [CISF]."[85]

Although Mr. Taylor and other Fasken employees do not live two miles from the Holtec site, we conclude

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81. Motion for Permission to File Supplemental Standing Declaration of Tommy E. Taylor, Suppl. Decl. of Tommy Taylor ¶ 1 (Dec. 10, 2018) [hereinafter Suppl. Decl. of Tommy Taylor].

82. *See* Fasken Motion to Dismiss, Decl. of Tommy Taylor ¶ 3 (Sept. 14, 2018).

83. Supp. Decl. of Tommy Taylor ¶ 3.

84. *Id.* ¶ 4.

85. *Id.* ¶ 5.

that the extreme closeness of the Fasken site, coupled with a reasonable expectation of regular visits for work-related activities, are sufficient to justify a presumption of standing. In *Millstone*, by way of comparison, that licensing board found standing based on part-time residence, even though the part-time residence was five times as distant (10 miles) from the storage facility, and the facility itself was a small fraction of the size to which Holtec hopes its facility will grow.[86]

Fasken has demonstrated standing. However, as discussed *infra*, because Fasken has not proffered any contention of its own, much less an admissible contention, its request for an evidentiary hearing must nonetheless be denied.

E. AFES

AFES describes itself as an environmental group whose members are principally located in the area of Holtec's proposed storage facility.[87] It states that its members are working to oppose "the small group of economic elites ('the one percent'), who have gone unchallenged, as they seek to impose their personal economic agendas on the backs of the economically vulnerable people of Southern New Mexico."[88] Of especial relevance, AFES is "concerned about environmental

86. *Millstone*, LBP-00-2, 51 NRC at 27-28.

87. AFES Pet. at 1.

88. *Id.* at 2.

and health issues related to oil, gas, uranium mining, radioactive waste transportation, disposal or storage and nuclear enrichment and processing."[89]

AFES submitted affidavits from four members, the closest of whom lives 35 miles from the proposed facility.[90] One member has worked for the past six months for an employer located 10 miles from the site, although it is unclear how much time she spends there, as she describes her job as including "driving around much of Eddy and Lea County."[91] All four members state that, on a regular basis, they use the main road between Hobbs and Carlsbad (US 62-180, which passes 0.52 miles from the Holtec site).[92]

We question whether these contacts are sufficient to establish standing. Although 35 miles is within the 50-mile proximity presumption that applies to licensing reactors, it is nearly twice the distance that any licensing board has found sufficient to support standing in a spent fuel storage case.[93] Having an employer located 10 miles

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89. *Id.*

90. *See* AFES Pet., Ex. 5, Aff. of Nicholas R. Maxwell ¶ 5 (Sept. 12, 2018) [hereinafter Aff. of Nicholas R. Maxwell].

91. *Id.*, Ex. 3, Aff. of Lorraine Villegas ¶ 6 (Sept. 12, 2018) [hereinafter Aff. of Lorraine Villegas].

92. Aff. of Nicholas R. Maxwell ¶ 6; Aff. of Lorraine Villegas ¶ 7; AFES Pet., Ex. 2, Aff. of Roase Gardner ¶ 9 (Sept. 12, 2018); *id.*, Ex. 4, Aff. of Noel V. Marquez ¶ 9 (Sept. 12, 2018).

93. *See Diablo Canyon ISFSI*, LBP-02-23, 56 NRC at 428-29 (ruling 17 miles sufficient for standing).

from the site does suggest some similarity to the facts in *Millstone*, where a part-time residence at that distance from a storage facility was found sufficient.[94] However, the record suggests that the pertinent AFES member might not actually spend her work day at that location and does not reflect for how long she expects her six-month employment to continue.[95] Finally, we do not find that necessarily fleeting contacts with land near the proposed facility by using a highway that passes a half mile away are sufficient to qualify.

On the other hand, the proposed Holtec facility is envisioned as potentially much larger than any previous spent fuel storage facility. In this uncharted area, we are reluctant to rule unnecessarily on what geographic distance might or might not be sufficient for a presumption of standing. Because AFES plainly has not submitted an admissible contention, as discussed *infra*, we deny its request for an evidentiary hearing on that ground alone and make no determination of its standing.

F. NAC

NAC describes itself as a "leading nuclear fuel cycle technology company that provides storage systems for [spent nuclear fuel]."[96] According to NAC, much of the design information for its canisters is proprietary, and

94. *See Millstone*, LBP-00-2, 51 NRC at 27-28.

95. Aff. of Lorraine Villegas ¶ 6.

96. NAC Pet. at 4.

because NAC has not licensed or authorized anyone to furnish its proprietary design information to Holtec this information is not available to Holtec.[97]

NAC therefore claims that it will be harmed if NAC's canisters are placed in Holtec's storage facility. Specifically, NAC claims that, lacking NAC's proprietary information, Holtec would be unable to adequately evaluate or respond to events that affect NAC canisters stored in Holtec's facility.[98] As a result, NAC alleges, it would likely (1) be urged to provide its proprietary information to Holtec; (2) be harmed in its reputation for safety and reliability; (3) be subject to harm to its proprietary interest in its own NRC Certificates of Compliance for spent fuel storage systems approved under Part 72; and/or (4) be subject to third-party claims of financial responsibility.[99]

NAC claims standing on the basis of these alleged injuries. Alternatively, NAC asks the Board to grant it discretionary intervention under 10 C.F.R. § 2.309(e).

The difficulty with NAC's standing claim is that it has nothing at stake at the present time. Holtec's present application, if granted, would not allow storage of NAC canisters at the proposed facility. On the contrary, the application's proposed License Condition 9 would authorize storage only in casks designated in accordance with the

97. *Id.*

98. *See id.*

99. *Id.* at 5.

Certificate of Compliance for Holtec's HI-STORM UMAX storage system.[100] That Certificate, in turn, only allows storage of two specific types of Holtec canisters—not NAC's or anyone else's canisters.[101]

When and if, at some future time, Holtec wants NRC authorization to store NAC canisters at Holtec's facility, then both Holtec's Certificate of Compliance and facility license would need to be amended, and NAC could seek to participate in proceedings concerning those amendments. NAC's counsel creatively posits various reasons why NAC might find those alternatives less satisfactory,[102] but the unavoidable reality is that NAC has not suffered and cannot suffer any injury that entitles it to standing in the present proceeding.

NAC has not demonstrated standing. Moreover, because NAC has not proffered an admissible contention, as discussed *infra*, its request for an evidentiary hearing must be denied on that ground as well.

For similar reasons, the Board denies NAC's alternative request for discretionary intervention. NAC's

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100. *See* Proposed License for Independent Storage of Spent Nuclear Fuel and High-Level Radioactive Waste (ADAMS Accession No. ML17310A223) [hereinafter Holtec Proposed License].

101. *See* HI-STORM UMAX Certificate of Compliance No. 1040, Appendix B, Amend. No. 2, Approved Contents and Design Features for the HI-STORM UMAX Canister Storage System (ADAMS Accession No. ML16341B107).

102. Tr. at 179-209.

further participation would significantly and improperly broaden the scope of this proceeding, contrary to 10 C.F.R. § 2.309(e)(2), because NAC seeks to address concerns that will not be affected by whether or not the NRC grants the license Holtec is seeking.

III. CONTENTION ADMISSIBILITY STANDARDS

A. Legal Standards Governing Contention Admissibility

For its hearing request to be granted, in addition to demonstrating standing, a petitioner must proffer at least one admissible contention.[103]

An admissible contention must: (1) state the specific legal or factual issue to be raised or controverted; (2) provide a brief explanation for the basis of the contention; (3) demonstrate that the issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) concisely state the alleged facts or expert opinions that support the petitioner's position and on which the petitioner intends to rely at an evidentiary hearing, including references to the specific sources and documents on which the petitioner intends to rely; and (6) show that a genuine dispute exists on a material issue of law or fact by referring to specific portions of the application that the petitioner disputes or, if the application

103. 10 C.F.R. § 2.309(a).

is alleged to be deficient, by identifying such deficiencies and the supporting reasons for this allegation.[104]

A further requirement applies to several contentions addressed *infra*. No NRC rule or regulation may be challenged in a contention unless the petitioner seeks and obtains a waiver from the Commission in accordance with 10 C.F.R. § 2.335. No petitioner in this proceeding has sought such a waiver.

The contention admissibility rules are "strict by design."[105] The Commission has observed that they "properly 'reserve our hearing process for genuine, material controversies between knowledgeable litigants.'"[106] Failure to satisfy even one of the requirements requires the Board to reject the contention.[107]

This six-factor standard resulted from the Commission's effort to "raise the threshold bar for an admissible contention."[108] Previously, licensing boards would

104. *Id.* § 2.309(f)(i)-(vi).

105. *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001).

106. *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-8, 75 NRC 393, 396 (2012) (quoting *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

107. *See Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

108. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

sometimes admit contentions "that appeared to be based on little more than speculation[,]" and petitioners would try to "unearth" admissible contentions "through cross-examination."[109] Rather than expend agency time and resources on vague and unsupported claims,[110] the Commission strengthened the contention admissibility standards to what they are today—standards that afford evidentiary hearings only to those who "proffer at least some minimal factual and legal foundation in support of their contentions."[111]

Therefore, although a petitioner need not prove its contention at this stage, mere notice pleading of proffered contentions is insufficient.[112] Rather, the NRC requires a petitioner to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view, and explain why it disagrees with the applicant.[113]

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109. *Id.*

110. *See* Changes to the Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

111. *Oconee*, CLI-99-11, 49 NRC at 334.

112. *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003).

113. Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170-71 (Aug. 11, 1989).

B. Late-Filed Contentions

As some petitioners have filed motions to either amend their contentions or file new contentions, an explanation of the rules for amended or late-filed contentions is necessary.[114]

Because the initial deadline for filing contentions was September 14, 2018,[115] petitioners seeking to amend their original contentions or proffer new ones after that date must meet the "good cause" standard in 10 C.F.R. § 2.309(c)(1).[116] "Good cause" exists if the petitioner can show (1) the information upon which the amended or new contention is based was not previously available; (2) the information upon which the filing is based is materially

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114. Motion by [Joint Petitioners] to File a New Contention (Jan. 17, 2019); Sierra Club's Motion to File a New Late-Filed Contention (Jan. 17, 2019); Motion of [Joint Petitioners] to Amend Their Contentions 4 and 7 Regarding Holtec's Decision to Have No Dry Transfer System Capability and Holtec's Policy of Returning Leaking, Externally Contaminated or Defective Casks and/or Canisters to Originating Reactor Sites (Feb. 18, 2019) [hereinafter Joint Pet'rs Motion to Amend Contentions 4 & 7]; Sierra Club's Additional Contentions in Support of Petition to Intervene and Request for Adjudicatory Hearing (Feb. 25, 2019) [hereinafter Sierra Club Contentions 27, 28, 29]; Sierra Club's Motion to File New Late-Filed Contentions 27, 28, and 29 (Feb. 25, 2019) [hereinafter Sierra Club's Motion to File New Late-Filed Contentions 27, 28, and 29].

115. *See* Notice of Opportunity to Request a Hearing, 83 Fed. Reg. at 32,919.

116. *See* 10 C.F.R. § 2.309(b); *see also id.* § 2.309(f)(2).

different from information previously available;[117] and (3) the filing has been submitted in a timely fashion based on the availability of the subsequent information.[118] Previously available information that is newly acquired by the petitioner does not constitute good cause,[119] as "new and amended contentions must be *based on new facts* not previously available."[120]

C. NEPA Legal Standards

NEPA mandates that federal agencies prepare an environmental impact statement (EIS) before undertaking any "major Federal actions significantly affecting the quality of the human environment."[121] The preparation

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117. "Materially different" in this context concerns the "type or degree of difference between the new information and previously available information." *Florida Power & Light Co.* (Turkey Point Units 6 and 7), LBP-17-6, 86 NRC 37, 48, *aff'd*, CLI-17-12, 86 NRC 215 (2017).

118. 10 C.F.R. § 2.309(c)(1). *See also Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 493 (2008) (observing that many licensing boards have found 30 days from a triggering event for proffering a new or amended contention to be timely).

119. *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984).

120. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 493 n.70 (2012) (emphasis in original).

121. *See* 42 U.S.C. § 4332(2)(C); *see also Nat. Res. Def. Council v. NRC*, 823 F.3d 641, 643 (D.C. Cir. 2016).

of an EIS is meant to ensure that federal agencies "will not act on incomplete information, only to regret [their] decision after it is too late to correct."[122] NEPA requires agencies to take a "hard look at environmental consequences" of the proposed action,[123] and imposes a duty upon the agency to both "consider every significant aspect of the environmental impact of a proposed action" and "inform the public" of its analysis and conclusion.[124]

NEPA's "hard look" mandate notwithstanding, the agency is not obligated to analyze every conceivable aspect of the project before it.[125] Instead, this "hard look" is subject to a "rule of reason,"[126] meaning that the agency need not perform analyses concerning events that would be considered ""worst case" scenarios involving the project,[127] or those considered """remote and highly

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122. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

123. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

124. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97, 103 (1983) (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978)).

125. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002).

126. *Nat. Res. Def. Council v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972).

127. *Private Fuel Storage, L.L.C.*, CLI-02-25, 56 NRC at 352.

speculative."[128] NEPA does not necessitate """[sic]certainty or precision" nor does it mandate particular results from the agency.[129] Rather, NEPA requires "an *estimate* of anticipated (not unduly speculative) impacts" from the agency.[130] The statutory obligations seek to "guarantee process, not specific outcomes."[131]

At this stage of the proceeding, the NRC Staff has not issued an EIS for the proposed Holtec facility. NRC regulations nonetheless require petitioners to file environmental contentions "based on documents or other information at the time the petition is to be filed," i.e., the applicant's Environmental Report.[132] Although it is the NRC Staff's responsibility to comply with NEPA in its later- issued EIS,[133] we analyze contentions challenging the Environmental Report now as if those contentions will migrate as challenges to the Staff's later-issued EIS.[134]

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128. *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 754-55 (3d Cir. 1989).

129. *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-05-20, 62 NRC 523, 536 (2005).

130. *Id.* (emphasis in original).

131. *Massachusetts v. NRC*, 708 F.3d 63, 67 (1st Cir. 2013).

132. 10 C.F.R. § 2.309(f)(2). *See also Powertech (USA), Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), CLI-16-20, 84 NRC 219, 231 (2016).

133. 42 U.S.C. §§ 4321 *et seq.*

134. *See Powertech*, CLI-16-20, 84 NRC at 231; *see also Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford,

Appendix E

IV. CONTENTION ANALYSIS

A. Beyond Nuclear

Understanding Beyond Nuclear's sole contention (as well as some of the contentions proffered by other petitioners[135]) requires further explanation of the statutory scheme that was established by the NWPA. As discussed *supra*, Congress contemplated that DOE would build a national nuclear waste repository, but that the nuclear power companies would help pay for it. Under section 302 of the NWPA, power reactor licensees were required to pay into a Nuclear Waste Fund for construction of the repository.[136] In exchange, section 302(a)(5)(B) committed DOE to begin disposing of the nuclear power plants' spent fuel no later than January 31, 1998. When a permanent repository failed to materialize, the power plant licensees sued and began to recover from the federal government substantial damages to cover the cost of continuing to store spent fuel at their reactor sites.[137] Contract damage

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Nebraska), CLI-15-17, 82 NRC 33, 42 n.58 (2015) ("[A] contention 'migrates' when a licensing board construes a contention challenging [an Environmental Report] . . . as a challenge to a subsequently issued Staff NEPA document without the petitioner amending the contention.").

135. *See*, *e.g.*, Sierra Club Contention 1 and Joint Petitioners Contention 2, discussed *infra*.

136. 42 U.S.C. § 10222.

137. *See*, *e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. U.S. Dep't of Energy*, 736 F.3d 517, 520 (D.C. Cir. 2013); *Me. Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1341-42 (Fed.

lawsuits under the NWPA are now commonplace, and the federal government pays out damages to power reactor licensees on a regular basis.[138]

Thus, both DOE and the nuclear power plant owners potentially have an interest in contracting to use Holtec's proposed interim storage facility. DOE might want to take responsibility for the nuclear plants' spent fuel, pay Holtec to store it, and stop paying out damages. The nuclear plant owners, on the other hand, might be willing to apply their ongoing damage payments toward paying Holtec to store their spent fuel, so that it would be off their sites and no longer their responsibility to keep secure. Because the NWPA was drafted on the assumption that DOE would not accept title to spent nuclear fuel until a permanent repository becomes operational, however, it appears (as discussed *infra*) that in general only the second possibility would be consistent with the terms of the statute.

Beyond Nuclear's contention, as originally proffered in its hearing petition, therefore stated:

> The NRC must dismiss Holtec's license application and terminate this proceeding because the application violates the NWPA. The proceeding must be dismissed because the central premise of Holtec's application—

Cir. 2000); *Ind. Mich. Power Co. v. U.S. Dep't of Energy*, 88 F.3d 1272, 1276-77 (D.C. Cir. 1996).

138. *See, e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs*, 736 F.3d at 520.

> that the U.S. Department of Energy ("DOE") will be responsible for the spent fuel that is transported to and stored at the proposed interim facilities—violates the NWPA. Under the NWPA, the DOE is precluded from taking title to spent fuel unless and until a permanent repository has opened. 42 U.S.C. §§ 10222(a)(5)(A), 10143.[139]

In other words, initially Beyond Nuclear assumed that the "central premise" of Holtec's application was that Holtec would contract with DOE to store nuclear power companies' spent fuel. This would be unlawful under the NWPA, Beyond Nuclear contended.

After Holtec conceded that (with limited exceptions) such contracts would indeed be unlawful at the present time,[140] Beyond Nuclear moved to amend its contention to add the following statement:

> Language in Rev. 3 of Holtec's Environmental Report, which presents federal ownership as a possible alternative to private ownership of spent fuel, does not render the application lawful. As long as the federal government is listed as a potential owner of the spent fuel, the application violates the NWPA.[141]

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139. Beyond Nuclear Pet. at 10.

140. Tr. at 250-52.

141. Motion by Petitioners Beyond Nuclear and Fasken to Amend Their Contentions Regarding Federal Ownership of Spent

Appendix E

As discussed *infra*, the Board grants Beyond Nuclear's motion to amend its contention, in order to allege that even presenting federal ownership as a possible alternative to private ownership of spent fuel violates the NWPA.

As events have unfolded, therefore, Beyond Nuclear's contention now raises this fundamental question: May the NRC license Holtec's storage facility to enter into lawful contracts with potential customers, including those that may later become lawful? Or, if Congress were to expand the category of lawful contracts (specifically, to include most contracts with DOE), would it be necessary (as Beyond Nuclear claims) for Holtec to re-submit its license application and for the NRC to re-notice a new opportunity for a hearing?[142] We conclude that, to implement the will of Congress in such circumstances, the NRC need not require Holtec to begin the licensing process all over again.

As explained *supra*, initially Beyond Nuclear filed with the Commission a motion to dismiss the Holtec licensing proceeding as violating the NWPA.[143] At the same time, out of an abundance of caution, Beyond Nuclear also filed essentially the same claim in the form of a

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Fuel to Address [Holtec's] Revised License Application (Feb. 6, 2019) at 8 [hereinafter Beyond Nuclear and Fasken Motion to Amend].

142. *See id.* at 11 n.5.

143. Beyond Nuclear Motion to Dismiss at 1.

hearing request and contention.[144] The Secretary of the Commission denied Beyond Nuclear's motion to dismiss on procedural grounds, without prejudice to its underlying arguments, and directed that the matter should proceed before a licensing board on the basis of Beyond Nuclear's hearing petition.[145]

In support of its contention, Beyond Nuclear incorporated by reference portions of its motion to dismiss.[146] Beyond Nuclear identified language in Holtec's Environmental Report that said Holtec would enter into a contract with DOE by which DOE will take title to spent fuel and be responsible for transporting it to the site.[147] It also identified language in Holtec's Safety Analysis Report that said Holtec might *either* contract with DOE or with nuclear plant owners themselves, leading to an inconsistency in the application documents.[148]

Beyond Nuclear contended that the first scenario (that is, Holtec's contracting with DOE) would be unlawful under the NWPA. As Beyond Nuclear pointed out, the NWPA provides that until a permanent waste repository (such as Yucca Mountain) opens, "the generators and owners of high-level radioactive waste and spent nuclear

144. Beyond Nuclear Pet.

145. Order Denying Motions to Dismiss at 2.

146. Beyond Nuclear Pet. at 10.

147. Beyond Nuclear Motion to Dismiss at 16 (citing ER, rev. 0 at 1-1, 3-104).

148. *Id.* at 16 n.4 (emphasis added).

fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel."[149] For this reason, Beyond Nuclear argued, the NWPA states that DOE will take title to spent fuel only "following commencement of operation of a repository."[150] It is undisputed that no such repository has been licensed or constructed, much less become operational.

The NRC Staff agreed that Beyond Nuclear's contention should be admitted to the extent it challenged the inconsistency between Holtec's Environmental Report and its Safety Analysis Report.[151] The Staff, however, deemed it "premature to take a position on how the applicant will address the inconsistency."[152]

Holtec, for its part, contended that the inconsistencies were a mistake, that its actual intent is to contract either with DOE or with nuclear plant owners, and that the inconsistencies were "in the process of being revised to eliminate any confusion."[153] Holtec also suggested it

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149. 42 U.S.C. § 10131.

150. *Id.* § 10222(a)(5)(A). *See also id.* § 10143 ("Delivery, and acceptance by the Secretary [of Energy], of any high-level radioactive waste or spent nuclear fuel *for a repository* . . . shall constitute a transfer to the Secretary of title to such waste or spent fuel.") (emphasis added).

151. NRC Staff Consol. Answer at 66.

152. *Id.* at 66 n.296.

153. Holtec Answer to Beyond Nuclear at 20.

"worth noting that Petitioner's claims of current NWPA restrictions may well be superseded by Congress."[154] But Holtec did not initially concede in its response that contracting for DOE to take title to nuclear power companies' spent fuel would necessarily be unlawful under the NWPA as currently in effect.

The Board, therefore, was inclined to agree with the NRC Staff that Beyond Nuclear's contention was admissible, but to admit it as a legal issue contention for a broader purpose: that is, to determine whether or not Holtec could lawfully contract directly with DOE to take title to power companies' spent nuclear fuel. At the very least, the Board tentatively concluded, Beyond Nuclear had set forth a plausible case that Holtec could not lawfully elect this option, consistent with the NWPA.[155]

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154. *Id.* at 21 (citing proposed but unenacted amendments to the NWPA).

155. A contention may state an "issue of law or fact." 10 C.F.R. § 2.309(f)(1)(i). As should be obvious, a legal issue contention need not necessarily address every requirement of section 2.309(f)(1), such as the requirement to provide "a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue." *Id.* § 2.309(f)(1)(v). *See U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 NRC 580, 588-91 (2009) ("We agree, for example, with the Boards' view in this proceeding that requiring a petitioner to allege "facts' under section 2.309(f)(1)(v) or to provide an affidavit that sets out the 'factual and/or technical bases' under section 51.109(a)(2) in support of a *legal* contention—as opposed to a *factual* contention—is not necessary.").

At oral argument, however, Holtec's counsel conceded that, with very limited exceptions, it would violate the NWPA as currently in effect for DOE to take title to nuclear plant owners' spent fuel. He stated:

> I will agree with you that, on their current legislation, DOE cannot take title to spent nuclear fuel from commercial nuclear power plants, under the current statement of facts, but that could change, depending on what Congress does.[156]

Holtec's counsel committed, however, that Holtec has no intention of contracting with DOE to accept most nuclear power plants' spent fuel unless and until Congress amends the NWPA to make that lawful.[157] Meanwhile, Holtec represented, it has every intention of proceeding with the project on the assumption it will contract directly with the nuclear plant owners themselves.[158] Finally, Holtec has, in fact, revised its Environmental Report to say that the proposed facility's customers could be either DOE or the nuclear power plant owners.[159]

In the aftermath of these developments, Beyond Nuclear moved to amend its contention to add the statement set forth above. In essence, Beyond Nuclear

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156. Tr. at 250. *See also* Tr. at 251-52.

157. Tr. at 248.

158. *Id.*

159. *See* ER at 3-117.

now claims that reference to the mere possibility of contracting directly with DOE must be expunged from Holtec's application—regardless of Holtec's intentions and regardless of whether Congress might amend the NWPA.

Because Beyond Nuclear seeks to amend its contention after the deadline for filing petitions, we must first consider whether its motion to file the contention satisfies the three-prong test in 10 C.F.R. § 2.309(c)(1)(i)-(iii). Although Holtec argues to the contrary,[160] we conclude that it does. Holtec's revised Environmental Report (Rev. 3) was not available until January 17, 2019. Its revised Environmental Report is materially different from Holtec's original license application because it replaces unequivocal language regarding DOE ownership of spent fuel with language stating that either DOE or private entities will own the spent fuel. Beyond Nuclear's motion to amend was timely filed less than three weeks after the availability of Holtec's revised Report—well within the 30 days in which licensing boards have generally allowed petitioners to respond to new information.[161] We therefore grant Beyond Nuclear's motion to amend.

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160. Holtec Opposition to Beyond Nuclear and Fasken Motion to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address [Holtec's] Revised License Application (Feb. 19, 2019) at 2-6 [hereinafter Holtec Opposition to Beyond Nuclear and Fasken Motion]. The NRC Staff response addresses the admissibility of the amended contention without considering its timeliness. *See* NRC Staff Answer to Beyond Nuclear and Fasken Motion.

161. *See Shaw AREVA MOX Servs.*, LBP-08-11, 67 NRC at 493.

Turning to the amended contention itself, however, we conclude that Beyond Nuclear no longer identifies a genuine dispute with Holtec's license application. The inconsistency between Holtec's Environmental Report and its Safety Analysis Report has been fixed: Holtec's application now consistently says that its customers will be either DOE or the nuclear power plant owners. As Holtec's proposed License Condition 17 states, it will undertake construction only after it has established "a definitive agreement with the prospective user/payer for storing the used fuel (USDOE and/or a nuclear plant owner)."[162] At the same time, Beyond Nuclear, Holtec, and this Board all agree that, with limited exceptions, DOE may not lawfully take title to spent nuclear waste under the NWPA as currently in effect.[163]

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162. Holtec Proposed License at 2.

163. Although Beyond Nuclear, Holtec, and the Board are all in agreement, the NRC Staff has not taken a position, despite having multiple opportunities to do so. *See* NRC Staff Answer to Beyond Nuclear and Fasken Motion. Accordingly, the Staff would find Beyond Nuclear's amended contention admissible "specifically as a challenge to whether the application may propose a license condition that includes the potential for DOE ownership of spent fuel to be stored at the Holtec facility." *Id.* at 2. The Staff cautions, however, that "in agreeing that the contention is admissible in part, the Staff takes no position on the underlying merits of the contention." *Id.* As best we can tell, the Staff would prefer the Board address the issue as a legal issue contention, precipitating yet another round of briefing and perhaps another oral argument. After thus far receiving well over a thousand pages of briefs and conducting two days of oral argument, the Board is prepared to address this legal issue in the context of deciding contention admissibility.

Appendix E

Beyond Nuclear claims that the mere mention of DOE renders Holtec's license application unlawful. But that is not so. First, DOE does, in fact, already hold title to a relatively small amount of spent nuclear fuel from commercial reactors that could lawfully be stored at Holtec's facility in the future without violating the NWPA.[164] Second, the Board assumes Holtec will honor its commitment not to contract unlawfully with DOE to store any other spent nuclear fuel (that is, the vast majority of spent fuel from commercial reactors, which is currently owned by the nuclear power companies). Likewise, we assume DOE would not be complicit in any such unlawful contracts.

Holtec represents that it is committed to going forward with the project by contracting directly with nuclear plant owners that currently hold title to their spent fuel.[165] Whether Holtec will find that alternative commercially viable is not an issue before the Board, because the business decision of whether to use a license has no bearing on a licensee's ability to safely conduct the activities the license authorizes. As the Commission instructs us, "the NRC is not in the business of regulating the market strategies of licensees or determining whether market strategies warrant commencing operations."[166]

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164. Tr. at 237, 249-50.

165. Tr. at 248.

166. *Louisiana Energy Services* (National Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005) (quoting *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 48-49 (2001)).

Holtec readily acknowledges that it hopes Congress will change the law and allow it in most instances to contract directly with DOE to store spent nuclear fuel.[167] Meanwhile, we assume that Holtec—having acknowledged on the record that (with limited exceptions) it would be unlawful to contract with DOE under the NWPA as currently in effect—will not try to do just that. Nor may we assume that DOE would be complicit in a violation of the NWPA.[168] On the contrary, DOE has also taken the position publicly that it may not take title to most private plant companies' spent nuclear fuel without violating the NWPA as currently in effect.[169]

Neither the facts nor the law, therefore, remain in dispute. Holtec seeks a license that would allow it to enter

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167. Tr. at 248, 250.

168. A presumption of regularity applies to federal agencies, which should be assumed to act properly in the absence of evidence to the contrary. *See*, *e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926).

169. *See*, *e.g.*, Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793, 21,793-94, 21,797 (1995); *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 756 (D.C. Cir. 1997) ("The Department also took the position that 'it lacks statutory authority under the Act to provide interim storage.'") (quoting 60 Fed. Reg. at 21,794); *Ind. Mich. Power Co. v. U.S. Dep't of Energy*, 88 F.3d 1272, 1274 (D.C. Cir. 1996) ("The [DOE] also determined that it had no authority under the NWPA to provide interim storage in the absence of a facility that has been authorized, constructed and licensed in accordance with the NWPA.").

into lawful customer contracts today, but also permit it to enter into additional customer contracts if and when they become lawful in the future. If Congress decides to amend the NWPA to allow DOE to take title to spent nuclear fuel before a national nuclear waste repository becomes operational, the only difference would be that DOE could then lawfully contract with Holtec to store the same spent fuel that presently belongs to the nuclear power plant owners. The NRC Staff assures us that it is reviewing Holtec's application in light of both possibilities: "[T]he Staff bases its safety and environmental reviews on the application as presented, which seeks a license on the basis that either DOE or private entities may hold title to the waste."[170]

We see no discernable purpose that would be served, in such circumstances, by requiring Holtec to file a new or amended license application for its storage facility or by the NRC entertaining a fresh opportunity to request a hearing. Beyond Nuclear correctly points out that the Administrative Procedure Act (APA) requires federal agencies to follow the law,[171] but we do not interpret either the APA or NWPA to require the NRC to perform a useless act.

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170. NRC Staff 's Consolidated Response to [Joint Petitioner's] and Sierra Club's Motions to File New Contentions (Feb. 19, 2019) at 9 [hereinafter NRC Staff Response to Joint Pet'rs and Sierra Club Motions].

171. Beyond Nuclear Motion to Dismiss at 12.

Beyond Nuclear's contention, as amended, is not admitted.[172]

B. Sierra Club

1. Sierra Club Contention 1

Sierra Club's Contention 1 originally stated:

> The NRC has no authority to license the Holtec CIS facility under the NWPA nor the AEA. Holtec has said that DOE must take title to the waste, but the NWPA does not authorize DOE to take title to spent fuel in an interim storage facility. The AEA has no provision for licensing a CISF.[173]

On the same day Beyond Nuclear moved to amend its contention, Sierra Club moved to amend Sierra Club Contention 1 to add exactly the same statement:

> Language in Rev. 3 of Holtec's Environmental Report, which presents federal ownership as a possible alternative to private ownership

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172. Although Fasken purports to join in Beyond Nuclear's motion to amend, it may not properly do so. As explained *infra*, Fasken did not initially submit an admissible contention of its own, and its hearing request must therefore be denied. In any event, the procedural point is moot, because the Board rules that Beyond Nuclear's contention, as amended, is not admissible.

173. Sierra Club Pet. at 10-11.

> of spent fuel, does not render the application lawful. As long as the federal government is listed as a potential owner of the spent fuel, the application violates the NWPA.[174]

Insofar as Sierra Club Contention 1 now asserts that reference to the mere possibility of contracting with DOE must be expunged from Holtec's application, it is substantially similar to Beyond Nuclear's amended contention, addressed *supra*. We therefore likewise grant Sierra Club's motion to amend Contention 1, but rule it is not admissible for the same reasons that Beyond Nuclear's amended contention is not admissible.

Insofar as Sierra Club Contention 1 also asserts that any away-from-reactor interim storage facility is necessarily unlawful under the AEA and/or the NWPA, it is not admissible for other reasons. NRC regulations expressly allow licensing of such facilities.[175] Therefore, this argument constitutes an impermissible challenge to NRC regulations that is precluded by 10 C.F.R. § 2.335. Moreover, the United States Court of Appeals for the District of Columbia Circuit has rejected this aspect of Sierra Club Contention 1—ruling that the NRC has authority under the AEA to license such privately owned facilities, and that the NWPA did not repeal or supersede

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174. Sierra Club's Motion to Amend Contention 1 (Feb. 6, 2019) at 11 [hereinafter Sierra Club Motion to Amend Contention 1].

175. *See generally* 10 C.F.R. Part 72; *see also id.* §§ 72.32(a) & 72.46(d) (referring to requirements pertaining to interim storage facilities not co-located with a power plant).

that authority.[176]

Sierra Club Contention 1, as amended, is not admitted.

2. Sierra Club Contention 2

Sierra Club Contention 2 states:

> The Holtec Environmental Report, in attempting to describe the purpose and need for this project, claims that [consolidated interim storage] is safer and more secure than storing the waste at the reactor site. However, the environmental report cites no evidence or data to support this assertion. An agency cannot rely on self-serving statements, especially ones with no supporting data, from the prime beneficiary of the project.[177]

Sierra Club relies on a 2003 report by Dr. Gordon Thompson, who is asserted to be an expert in technical and policy analyses in the fields of energy and environment.[178] According to Sierra Club, Dr. Thompson's report "documents the benefits of HOSS [hardened on-site

176. *Bullcreek v. NRC*, 359 F.3d 536, 538, 543 (D.C. Cir. 2004).

177. Sierra Club Pet. at 17.

178. *Id.* at 19-20 (citing Gordon Thompson, Robust Storage of Spent Nuclear Fuel: A Neglected Issue of Homeland Security (2003)). For Dr. Thompson's credentials, see Sierra Club's Motion to Amend Contention 16, attach., Curriculum Vitae for Gordon R. Thompson (Feb. 18, 2019).

storage]," and further claims that the "[Environmental Report] and subsequent EIS must examine the relative safety of HOSS at reactor sites."[179]

Although Sierra Club disputes one sentence, Holtec's Environmental Report's purpose and need statement lists multiple reasons to support licensing the proposed facility. For example, decommissioned plants may become greenfields rather than storage facilities, and utilities may eliminate costs and liability by relinquishing responsibility for spent fuel stored on-site.[180] Sierra Club only disputes the safety and security reason, and does not explain how Holtec's assertion of safety and security compromises the application in a material way.

Furthermore, as the NRC Staff points out,[181] Sierra Club fails to show that an analysis of HOSS at reactor sites is material to the environmental review required by NEPA or the Agency's corresponding regulations.

Sierra Club Contention 2 is not admitted.

3. Sierra Club Contention 3

Sierra Club Contention 3 states:

> The statement in the [Environmental Report] that [consolidated interim storage] is safer

179. Sierra Club Pet. at 19-20.

180. ER at 1-6.

181. NRC Staff Consol. Answer at 70.

> and more secure than storage at a reactor site contradicts the NRC's Continued Storage Rule, which concludes that spent radioactive fuel can be safely stored at a reactor site indefinitely. Therefore, there is no basis for accepting the statement in the [Environmental Report], and there is no purpose and need for the Holtec project.[182]

Similar to Sierra Club Contention 2, this contention also challenges the ""safer and more secure" language in the purpose and need section of Holtec's Environmental Report. Here, Sierra Club disputes that there is a purpose or need for the proposed facility, because the NRC's Continued Storage Rule and Continued Storage Generic EIS (GEIS) determined that at-reactor storage for an indefinite period would generally result in only "small" environmental impacts.[183] Sierra Club further alleges that the proposed facility would cause increased risks "due to the risks of transporting the waste to the [consolidated interim storage] site and the increased risk of so much waste being stored in one place."[184] Finally, Sierra Club incorporates all of its allegations from Contention 2 in support of this contention.[185]

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182. Sierra Club Pet. at 21.

183. *Id.* at 22. *See* 10 C.F.R. § 51.23 [hereinafter Continued Storage Rule]; *see also* 1 NMSS, [GEIS] for Continued Storage of Spent Nuclear Fuel, NUREG-2157, at 5-48 (Sept. 2014) (ADAMS Accession No. ML14196A105) [hereinafter Continued Storage GEIS].

184. Sierra Club Pet. at 22.

185. *Id.*

We agree with the NRC Staff[186] and Holtec[187] that Sierra Club fails to raise a genuine dispute with the application, because it does not show an actual contradiction between the Environmental Report and the Continued Storage Rule/GEIS. Although the Continued Storage GEIS did find that spent fuel may be stored on-site with minimal environmental impact, it did not endorse any particular storage method or perform any qualitative analysis of the safety benefits of at-reactor storage vs. away-from-reactor consolidated storage. It also found that any "additional accumulated impacts from transportation of the entire inventory of spent fuel from multiple reactors to an away-from-reactor ISFSI would be . . . minor."[188]

Regarding Sierra Club's assertion that there is no purpose and need "if spent fuel can be safely stored at the reactor site indefinitely," Sierra Club does not dispute or even acknowledge the separate reasons for the proposed facility listed in Holtec's Environmental Report. As explained in our discussion of Sierra Club Contention 2, the purpose and need statement also describes how decommissioned plants may become greenfields rather than storage facilities, as well as how utilities can eliminate costs and liability by relinquishing responsibility for spent fuel stored on-site.[189] Sierra Club only disputes the safety and security reason, and does not explain how

186. NRC Staff Consol. Answer at 70-72.

187. Holtec Answer to Sierra Club at 25-27.

188. Continued Storage GEIS at 5-52.

189. ER at 1-6.

Holtec's assertion of safety and security compromises the application in a material way.

Sierra Club Contention 3 is not admitted.

4. Sierra Club Contention 4

Sierra Club Contention 4 states:

> Operation of the [consolidated interim storage] site as proposed by Holtec would necessitate the transportation of the radioactive waste from reactor sites to the [consolidated interim storage] facility. Transportation from the reactors to the [consolidated interim storage] site carries substantial risks. These risks must be evaluated in the [Environmental Report].[190]

On its face, Sierra Club Contention 4 appears to be a contention of omission—claiming that Holtec's Environmental Report does not evaluate transportation risks. In its basis for the contention, however, Sierra Club clarifies that its claim is actually that the Environmental Report "does not adequately address these risks."[191] Specifically, it asserts that the Environmental Report underestimates both (1) the consequences of severe rail accidents involving shipments of radioactive waste;[192] and

190. Sierra Club Pet. at 22.

191. *Id.* at 23.

192. *Id.* at 24-25.

(2) the likelihood of such accidents.[193] Sierra Club relies on the accompanying declaration of Dr. Marvin Resnikoff.[194]

Although the NRC Staff would admit the contention insofar as it addresses the potential consequences of rail accidents,[195] the Board disagrees. The centerpiece of Sierra Club's argument on this point is a 2001 report by Matthew Lamb and Dr. Resnikoff that evaluated the radiologic consequences of the 2001 Baltimore Tunnel Fire if it had involved spent nuclear fuel.[196] The Lamb and Resnikoff report provides a substantially higher estimate of the impacts of a transportation accident than does Holtec's Environmental Report.[197] However, Sierra Club fails to acknowledge that Holtec's analysis took into account the Lamb and Resnikoff estimates, which were deemed unrealistic for reasons that Sierra Club does not address or dispute.

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193. *Id.* at 25-27.

194. *See* Sierra Club Pet. Decl. of Marvin Resnikoff (Sept. 14, 2018).

195. NRC Staff Consol. Answer at 72-73.

196. Sierra Club Pet. at 24-26.

197. Sierra Club also alleges more generally that the Environmental Report must address risks of radiation emissions during shipment that may occur other than from accidents. But the impact of dose along transportation routes from exposure from incident-free transportation is addressed in ER, Rev. 3, § 4.9.3.1 and tbl. 4.9.1, which Sierra Club fails to acknowledge.

Specifically, the evaluation in Holtec's Environmental Report is based on the DOE's Final Supplemental Environmental Impact Statement (DOE FSEIS) for Yucca Mountain.[198] Although the State of Nevada had urged DOE to estimate the consequences of a rail accident in an urban area by using Lamb and Resnikoff's report, DOE declined to do so. On the contrary, DOE concluded that relying on the Lamb and Resnikoff report would result in using "parameters that would be at or near their maximum values," whereas "DOE guidance for the evaluation of accidents in environmental impact statements . . . specifically cautions against the evaluation of scenarios for which conservative (or bounding) values are selected for multiple parameters because the approach yields unrealistically high results."[199] Accordingly, DOE concluded that "the State of Nevada estimates [relying on the Lamb and Resnikoff estimates] are unrealistic and . . . do not represent the reasonably foreseeable consequences of severe transportation accidents."[200]

Holtec's Environmental Report relies on and prominently references the DOE FSEIS in its evaluation of

198. DOE, [FSEIS] for a Geologic Repository for the Disposal of Spent Nuclear Waste at Yucca Mountain, Nye County, Nevada (2008) (ADAMS Accession No. ML081750191) [hereinafter DOE FSEIS].

199. DOE FSEIS, Vol. III at CR 271 (ADAMS Accession No. ML081750218).

200. *Id.*

the probable consequences of an accident.[201] Dr. Resnikoff is Sierra Club's expert on Contention 4, and surely can be charged with being familiar with DOE's criticism of his own work. By not addressing or disputing the criticisms of the Lamb and Resnikoff study contained in the DOE FSEIS (on which Holtec's Environmental Report relies), Sierra Club fails to demonstrate a genuine dispute with the application and Contention 4 is inadmissible under 10 C.F.R. § 2.309(f)(1)(vi) for that reason alone.

Moreover, at the very least the unanswered criticisms of Lamb and Resnikoff in the DOE FSEIS require us to conclude that Lamb and Resnikoff's estimates represent a "worst case" analysis. As Holtec's counsel emphasized at oral argument, the intensity of the 2001 Baltimore Tunnel Fire arose from the flammable contents of the railroad cars.[202] Because Holtec will ship spent fuel by dedicated trains, they will contain no such contents.[203] Furthermore, because the Federal Railway Administration (FRA) reviews such routes, Holtec would use a route that went through the Baltimore tunnel only if the FRA deemed it appropriate.[204] In short, a scenario similar to the 2001 Baltimore Tunnel Fire would be extraordinarily unlikely.

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201. ER, Rev. 3 at 4-34.

202. Tr. at 256.

203. *Id.* at 256-57.

204. *Id.* at 257.

NEPA (and the NRC's implementing regulations[205]) require only a discussion of reasonably foreseeable impacts. NEPA does not require a "worst case" analysis, which "creates a distorted picture of a project's impacts and wastes agency resources."[206] Rather, the purpose of the NRC's environmental review "is to inform the decisionmaking agency and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about 'worst case' scenarios and how to prevent them."[207]

As to the second prong of Sierra Club Contention 4—concerning the likelihood of rail accidents—we agree with both Holtec and the NRC Staff that it is not admissible. The Sierra Club has proffered no facts or expert opinions to support its assertion that Holtec relies on data that "does not incorporate recent information about rail fires and expanded traffic of oil tankers,"[208] and therefore again fails to demonstrate a genuine dispute.

Sierra Club Contention 4 is not admitted.

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205. 10 C.F.R. §§ 51.45, 51.61.

206. *Private Fuel Storage*, CLI-02-25, 56 NRC at 352.

207. *Id.* at 347.

208. Sierra Club Pet. at 25-26.

5. Sierra Club Contention 5

Sierra Club Contention 5 states:

> The [Environmental Report] states that waste would be stored at the [consolidated interim storage] facility for up to 120 years until a permanent repository is found. The [Environmental Report] and the subsequent EIS must address the purpose and need and the environmental impacts if a permanent repository is not found, and the Holtec facility becomes a de facto permanent repository.[209]

Sierra Club relies on *New York v. NRC*, 681 F.3d 471, 478 (D.C. Cir. 2012) to support its conclusion that an agency "must address the alternative of a permanent repository never being developed."[210]

As Holtec[211] and the NRC Staff[212] explain in their responses, Sierra Club is incorrect as a matter of law. Although *New York v. NRC* did hold that the NRC inadequately performed its NEPA evaluation by not considering the "environmental effects of failing to secure permanent storage," the NRC developed its Continued Storage Rule and Generic Environmental

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209. *Id.* at 27.

210. *Id.* at 28.

211. Holtec Answer to Sierra Club at 35-37.

212. NRC Staff Consol. Answer at 74-75.

Impact Statement (GEIS) as a response to the ruling.[213] The Continued Storage Rule addresses Sierra Club's concern directly: "The Environmental Reports . . . are not required to discuss the environmental impacts of spent nuclear fuel storage in . . . an [Independent Spent Fuel Storage Installation (ISFSI)] for the period following the term of the . . . ISFSI license."[214] The Continued Storage Rule incorporates the impact determinations from the Continued Storage GEIS, which considers the environmental impacts of short-term storage (60 years beyond license), long-term storage (100 years beyond license), and indefinite storage.[215] NRC regulations bar challenges to the Continued Storage Rule, unless the petitioner obtains a waiver from the Commission.[216] Sierra Club has not petitioned for a waiver, and therefore this contention is outside the scope of this proceeding.

Sierra Club Contention 5 is not admitted.

6. Sierra Club Contention 6

Sierra Club Contention 6 states:

> An [Environmental Report] is required to discuss alternatives to the proposed action. Pursuant

213. *New York v. NRC*, 681 F.3d 471, 473 (D.C. Cir. 2012). *See* Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,241 (Sept. 19, 2014).

214. 10 C.F.R. § 51.23(b).

215. Continued Storage GEIS at 1-13 to -15, 5-4 to -5.

216. *See* 10 C.F.R. § 2.335(a), (b).

> to NEPA, this includes an examination of the no-action alternative. The discussion of the no-action alternative in the Holtec [Environmental Report] is deficient because it does not discuss safer storage methods at the reactor sites, such as HOSS, nor does it acknowledge the NRC's Continued Storage Rule that concludes that waste can be safely stored at the reactor site indefinitely. Furthermore, the [Environmental Report] states that the no-action alternative is a reasonable alternative that would satisfy the purpose and need for the project.[217]

Sierra Club asserts that NEPA requires "substantial treatment of each alternative," rather than what it characterizes as a "no-action alternative . . . blandly dismissed with unsupportive statements."[218] Framed as a contention of omission, Sierra Club challenges the no-action alternative analysis in section 2.1 of Holtec's Environmental Report as deficient because it provides "no discussion of the relative benefits and costs of leaving the waste at the reactor site compared to the benefits and costs of sending waste from many reactors to the Holtec site."[219]

Contrary to Sierra Club's assertions, Holtec's Environmental Report does discuss the relative benefits

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217. Sierra Club Pet. at 29-30.

218. *Id.* at 31.

219. *Id.*

and costs of maintaining the status quo (leaving the waste at the reactor site) and implementing the proposed action. As Holtec[220] and the NRC Staff[221] explain, table 2.5 and section 4.14 of the Environmental Report compare the environmental impacts of the project with those of the noaction alternative. Likewise section 9.2.1, section 9.2.2, and tables 9.2.1 through 9.2.5 of the Environmental Report compare the no-action alternative's costs to those of the proposed action. Sierra Club's contention does not demonstrate a genuine dispute with the application, because it challenges section 2.1 without acknowledging that other sections of the Environmental Report contain the allegedly missing analysis.

Regarding Sierra Club's concern that the no-action alternative discussion in the Environmental Report does not acknowledge the NRC's Continued Storage Rule, section 2.1 specifically says that the "No Action Alternative would not be supportive of the [NRC's] rulemaking on the Continued Storage of [spent nuclear fuel]."[222] Additionally, table 2.5.1 and section 4.14 summarize the short-and long-term impacts of at-reactor storage, as adopted from the Continued Storage GEIS.[223] Not only does Sierra Club ignore this discussion, but it incorrectly states that the Continued Storage Rule "concludes that waste

220. Holtec Answer to Sierra Club at 40.

221. NRC Staff Consol. Answer at 76.

222. ER at 2-1.

223. *Id.* at 2-21 to -24, 4-63 to -65.

can be safely stored at the reactor site indefinitely."[224] The Continued Storage Rule incorporates the impact determinations from the Continued Storage GEIS, which merely analyzes the environmental impacts of storing waste at the reactor site after the end of a license. It did not include an analysis of safety benefits or advocate for a particular storage method. This part of the contention does not raise a genuine dispute with the application.

Regarding Sierra Club's assertion that the Environmental Report is deficient because it lacks a discussion of "safer storage methods . . . such as HOSS," we agree with the NRC Staff[225] and Holtec[226] that Sierra Club fails to demonstrate how such a discussion would be material to the no-action alternative analysis. HOSS is a method of storage that has not been licensed, must less implemented at any reactor site. The Environmental Report is only required to analyze a no-action alternative of maintaining the status quo. Sierra Club does not explain why analyzing the unused HOSS method is necessary to analyzing the status quo.

Sierra Club Contention 6 is not admitted.

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224. Sierra Club Pet. at 30, 32. *See also* Sierra Club Reply at 25 ("[T]he Continued Storage Rule determined that storage at the reactor site is safe.").

225. NRC Staff Consol. Answer at 77.

226. Holtec Answer to Sierra Club at 38.

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7. Sierra Club Contention 7

Sierra Club Contention 7 states:

> Holtec relies heavily on the assertion that the Blue Ribbon Commission on America's Nuclear Future (BRC) has recommended [consolidated interim storage] as the answer to the country's nuclear waste problem. On the contrary, the BRC report should not be viewed uncritically and does not necessarily deserve blind support in assessing the Holtec application. Holtec's [Environmental Report] therefore mischaracterizes both the BRC report's conclusions and the relative risks of [consolidated interim storage] versus onsite storage. The EIS must therefore independently and fully address the relative risks and benefits of both storage options.[227]

Sierra Club asserts that Holtec's proposed storage facility "is dictated to a great extent by the BRC report."[228] Sierra Club then further alleges that Holtec's Environmental Report mischaracterizes "both the BRC report's conclusions and the relative risks of [consolidated interim storage] versus onsite storage."[229] Sierra Club claims that Holtec's Environmental Report and the NRC's

227. Sierra Club Pet. at 32.

228. *Id.*

229. *Id.* at 34-35.

subsequent EIS must independently compare the risks and benefits of Holtec's proposed interim storage facility with the risks and benefits of storing spent fuel at the reactor sites where it was generated.

Sierra Club Contention 7 fails to raise a genuine dispute with Holtec's application, as required by 10 C.F.R. § 2.309(f)(1)(vi). Holtec's Environmental Report contains precisely the risk/benefit analysis that Sierra Club seeks,[230] and Sierra Club does not challenge it.

Section 1.1 of Holtec's Environmental Report does discuss the history and background of the nation's spent fuel dilemma, including enactment of the NWPA, suspension of the Yucca Mountain project, and the 2012 BRC report. And both Sections 1 and 2 suggest that Holtec's proposed facility would better advance the preference in the BRC report for a consent-based approach to siting spent nuclear fuel. But, regardless of whether that is correct, Sierra Club fails to show how that position at all affects the analysis of options that is actually undertaken in Holtec's Environmental Report.

Sierra Club Contention 7 is not admitted.

8. Sierra Club Contention 8

Sierra Club Contention 8 states:

> 10 C.F.R. § 72.30 establishes requirements for decommissioning interim storage facilities.

230. ER Ch. 9; *id.* tbl. 2.5.1.

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> An application for licensing a [consolidated interim storage] facility must contain a decommissioning plan explaining how the plan will satisfy the requirements in the regulation. The application for the Holtec [consolidated interim storage] facility does not comply with these requirements because the amount of funds Holtec says it will collect over the anticipated life of the project fall way short of what Holtec says are necessary for decommissioning.[231]

Sierra Club Contention 8 challenges whether Holtec's decommissioning plan provides reasonable assurance that funds will be available to decommission the proposed facility, as required by 10 C.F.R. § 72.30. Initially, the contention appeared admissible insofar as it identified an inconsistency in Holtec's calculation of how a decommissioning fund would be established.

Specifically, in its application Holtec commits that a "decommissioning fund will be established by setting aside $840 per MTU stored at the HI-STORE facility."[232] Holtec then calculates its initial fund contribution by multiplying $840 by the maximum amount that may be possessed under its proposed license: 8,680 MTUs (500

231. Sierra Club Pet. at 35.

232. [Holtec] & [ELEA] Underground CISF—Financial Assurance & Project Life Cycle Cost Estimates at 5 (ADAMS Accession No. ML18058A608) [hereinafter Holtec Financial Assurance Estimates].

loaded canisters).[233] As Sierra Club pointed out, however, section 1.3 of Holtec's Environmental Report initially estimated storing only 5,000 MTUs during the first year of operation.[234]

Acknowledging the disparity to be a mistake, Holtec has corrected its Environmental Report to conform to the 8,680 MTU figure used in its application.[235] As Holtec has explained, its Environmental Report "used an early, approximate value."[236] Holtec represents that "[w]hile this may have misled the Sierra Club, the decommissioning funding calculation is, and should be, based on the limits of licensed material that will be permitted under the initial license."[237] Accordingly, the Board determines that Sierra Club Contention 8 no longer raises a genuine dispute that warrants an evidentiary hearing.[238]

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233. Holtec Proposed License at 1 (Item 8 of the proposed license) and App. A (Technical Specifications), § 4.2.2 at 4-1. *See also* SAR at 1-4 ("Each stage is envisaged to have 8,680 MTUs.").

234. Sierra Club Pet. at 36 (citing [Holtec] HI-STORE CIS Facility Environmental Report, at 1-6 (rev. 1 Dec. 2017)).

235. HI-STORE CIS Facility Environmental Report, at 1-7 (rev. 3 Nov. 2018).

236. Holtec Answer to Sierra Club at 45 n.93.

237. *Id.*

238. The NRC Staff initially deemed the contention admissible in part. *See* NRC Staff Consol. Answer at 79. However, in light of the amended Environmental Report, the Staff stated at oral argument that it no longer takes a position on the admissibility of Sierra Club Contention 8. Tr. at 334-35.

Additionally, Sierra Club Contention 8 is not admissible insofar as it attempts to challenge other aspects of Holtec's decommissioning plan. For example, Sierra Club's claim that the fund would be "completely inadequate"[239] is premised on an analysis that simply overlooks Holtec's assumption that its annual payments would earn a reasonable rate of return: "These funds, plus earnings on such funds calculated at not greater than a 3 percent real rate of return over the 40-year license life of the facility, will cover the estimated cost to complete decommissioning."[240] Likewise, Sierra Club's charge that "the decommissioning costs are calculated for only the first phase of the project,"[241] overlooks the fact that the pending application only covers the first phase of the project. Holtec will be required to update its decommissioning plan in response to any "changes in the authorized possession limits."[242]

Finally, we find unpersuasive two arguments that Sierra Club advances belatedly in its reply. First, having initially overlooked Holtec's stated intention to rely in part on projected earnings on decommissioning fund assets, Sierra Club now dismisses Holtec's reliance on "the magic of compound interest" and claims "there is no assurance

239. Sierra Club Pet. at 36.

240. Holtec Financial Assurance Estimates at 5.

241. Sierra Club Pet. at 36.

242. 10 C.F.R. § 72.30(c)(3).

that the fund would earn 3% interest."[243] But, other than its own speculation, Sierra Club offers no evidence that a 3 percent annual rate of return over 40 years is unrealistic. Second, having likewise initially overlooked the reference to a surety method in Holtec's application,[244] Sierra Club now challenges Holtec's failure to provide more specificity.[245] Again, Sierra Club merely speculates that "it is doubtful that a surety company would issue a bond for this project" because "[s]urety companies only issue surety bonds when there is no possibility of risk."[246] Even if these two arguments were not impermissibly late, we would reject them as lacking any supporting facts or expert opinions.[247]

Sierra Club Contention 8 is not admitted.

9. Sierra Club Contention 9

Sierra Club Contention 9 states:

> The containers in which the waste will be transported to and stored at the Holtec

243. Sierra Club Reply at 28.

244. Holtec Financial Assurance Estimates at 5.

245. Sierra Club Reply at 29-30.

246. *Id.* at 29.

247. As set forth *infra*, the Board therefore denies as moot Holtec's motion to strike these arguments from Sierra Club's reply. *See* [Holtec's] Motion to Strike Portions of Replies of [AFES], [Joint Petitioners], [NAC], and Sierra Club (Oct. 26, 2018) at 10-11 [hereinafter Holtec Motion to Strike].

> [consolidated interim storage] site are designated for a design life of 60 years and a service life of 100 years and may present an unacceptable danger of radioactive release if they are required to remain after the end of their designated service life. Therefore, the [Environmental Report] must examine the environmental impact of the containers being used beyond their approved service life.[248]

Citing *New York v. NRC*, Sierra Club asserts that the Environmental Report "must consider all potential impacts if the [consolidated interim storage] ultimately continues to operate beyond the design life and service life."[249] Sierra Club also would have Holtec's Safety Analysis Report (SAR) "analyze and evaluate the design and performance of structures, systems, and components important to safety from operation of the . . . facility . . . [p]ursuant to 10 C.F.R. § 72.45(d)."[250]

In addition to concerns about the impacts of container use beyond certified service life, Sierra Club also expresses the safety concern that "[n]either Holtec nor the source of the waste has a plan in place to deal with leaking or cracking containers."[251] Sierra Club references

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248. Sierra Club Pet. at 38.

249. *Id.* at 40 (citing *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)).

250. *Id.* (internal quotations omitted).

251. *Id.* at 41-42.

a video of Holtec's chief executive saying that he believes it is impractical to repair a canister, as support for its claim that "Holtec canisters cannot be inspected, repaired or repackaged."[252] According to Sierra Club, this presents a problem not addressed by the Continued Storage GEIS, which "assumes that there will be a dry transfer system (DTS) that would retrieve waste from the casks for inspection and repackaging in new containers."[253] Sierra Club also describes Holtec's "return to sender" proposal as one that "must be evaluated," in light of an NRC Staff public meeting summary in which, Sierra Club claims, the NRC Staff "admitted that once a crack starts in a canister, it can grow through the wall in 16 years,"[254] and a Nuclear Waste Technical Review Board study about geologic repositories.[255]

Regarding the environmental aspects of this contention, the Continued Storage Rule explicitly states that an applicant's Environmental Report is not required

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252. *Id.* at 41.

253. *Id.* at 40-41.

254. *Id.* at 40 (citing Memorandum to Anthony Hsia, Deputy Director, Division of Spent Fuel Storage and Transportation, NMSS, Summary of August 5, 2014, Public Meeting with the Nuclear Energy Institute on Chloride Induced Stress Corrosion Cracking Regulatory Issue Resolution Protocol (Sept. 9, 2014)).

255. *Id.* at 42 (citing Nuclear Waste Technical Review Board, *Geologic Repositories: Performance Monitoring and Retrievability of Emplaced High-Level Radioactive Waste and Spent Nuclear Fuel* (May 2018)).

to discuss impacts following the proposed license term.[256] Holtec's application seeks a license for 40 years. It is not relevant to this proceeding that the HI-STORM UMAX system has a 60-year design life and a 100-year service life, or that subsequent license extensions are possible. Therefore, we agree with Holtec[257] and the NRC Staff[258] that Sierra Club impermissibly challenges the Continued Storage Rule and the impact evaluations contained in the Continued Storage GEIS. Because Sierra Club has not requested a waiver to challenge the GEIS, the environmental aspects of Sierra Club Contention 9 are outside the scope of this proceeding.

Regarding the safety aspects of this contention, Sierra Club has not pointed to deficient parts of the SAR and thus has not demonstrated a genuine dispute with Holtec's application. Rather, Sierra Club ignores the SAR's discussion of retrievability, inspection, and maintenance activities,[259] and instead challenges statements made by other sources outside of the application.[260]

Sierra Club Contention 9 is not admitted.

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256. 10 C.F.R. § 51.23(b).

257. *See* Holtec Answer to Sierra Club at 47-48.

258. *See* NRC Staff Consol. Answer at 80.

259. SAR at 1-39, 10-18 to -19, 15-3, 18-29 to -30.

260. For example, Sierra Club invokes statements allegedly made by NRC Staff members at an unrelated Nuclear Energy Institute public meeting in 2014—several years before Holtec's application was filed. Sierra Club Pet. at 41.

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10. Sierra Club Contention 10

Sierra Club Contention 10 states:

> The proposed Holtec [consolidated interim storage] facility will accept Greater Than Class C (GTCC) waste. NRC regulations specify that GTCC waste must be disposed of in a geologic repository licensed by the NRC, unless the Commission approves an alternative land-based disposal. The Holtec facility will not be a geologic repository. The NRC has not established regulations for approving land-based disposal of GTCC waste. The proposed Holtec [consolidated interim storage] facility does not comply with the requirement for a geologic repository or land-based disposal for GTCC waste. Therefore, a license cannot be issued for this facility.[261]

To support its contention, Sierra Club cites 10 C.F.R. § 61.55(a)(2)(iv), which it contends "specifies that GTCC waste must be disposed of in a geologic repository licensed by the NRC unless the Commission approves an alternative land disposal proposal."[262] According to Sierra Club, the fact that the NRC initiated a rulemaking to develop regulations for land disposal amounts to an admission that the NRC "has no legal or technical basis

261. Sierra Club Pet. at 42.

262. *Id.* at 43.

for approving a land-based disposal alternative for GTCC waste."[263]

We agree with the NRC Staff[264] and Holtec[265] that Sierra Club Contention 10 fundamentally misconstrues the nature of Holtec's application. Rather than *disposing* of GTCC waste under 10 C.F.R. Part 61, Holtec seeks to temporarily *store* reactor-related GTCC waste under Part 72.[266] Specifically, Holtec seeks a license for "a complex designed and constructed for the interim storage of spent nuclear fuel."[267] Sierra Club, therefore, fails to raise a dispute that is material to the license Holtec seeks.

Sierra Club Contention 10 is not admitted.

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263. *Id.* at 44.

264. *See* NRC Staff Consol. Answer at 82.

265. *See* Holtec Answer to Sierra Club at 55-56.

266. *See* Notice of Opportunity to Request a Hearing, 83 Fed. Reg. at 32,920 ("The NRC received an application from Holtec for a specific license pursuant to part 72 of title 10 of the *Code of Federal Regulations* (10 CFR), 'Licensing Requirements for the Independent Storage of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Related Greater Than Class C Waste.'").

267. 10 C.F.R. § 72.3 (defining "independent spent fuel storage installation or ISFSI").

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11. Sierra Club Contention 11

Sierra Club Contention 11 states:

> The [Environmental Report] and the subsequent EIS must evaluate the potential for earthquakes at the Holtec site and the environmental impact of earthquakes. Likewise, the Safety Analysis Report (SAR) must adequately evaluate the earthquake potential of the proposed site. Both the [Environmental Report] and SAR are inadequate in this respect.[268]

Sierra Club submits a map to purportedly support its allegation of "intense drilling in the area" around the proposed Holtec facility that would possibly cause earthquakes.[269] Sierra Club also points to a 2018 geology article[270] (the Stanford Report) that Sierra Club alleges stands for the proposition that "researchers [have] documented the existence of prior earthquakes in southeast New Mexico, and more importantly, the existence of numerous faults in the area in and around the proposed Holtec site."[271] Sierra Club's Contention 11

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268. Sierra Club Pet. at 44.

269. *Id.*; *id.*, Ex. 5.

270. *Id.*, Ex. 6, Jens-Erik Lund Snee & Mark D. Zoback, *State of Stress in the Permian Basin, Texas and New Mexico: Implications for Induced Seismicity*, The Leading Edge (Feb. 2018) [hereinafter Stanford Report].

271. *Id.* at 44-45.

therefore asserts both a challenge to the Environmental Report and a challenge to the SAR.

Sierra Club challenges Environmental Report section 3.3.2 by stating that the Environmental Report gives "fairly short shrift" to earthquake analysis around the proposed project site[272] and "essentially dismisses the likelihood of earthquakes in the area and does not mention any environmental impacts from earthquakes."[273] Sierra Club's "main problem" with the Environmental Report's earthquake data is that they are "historical" and allegedly do not take into account recent fracking activity around the proposed project site.[274]

Sierra Club similarly challenges SAR section 2.6, claiming that its seismic information "is historical data that does not take into account the recent increase in drilling for oil and natural gas in the area," which allegedly induces regional earthquakes.[275] Citing 10 C.F.R. § 72.103(f) (which, among other things, provides seismic rules for ISFSIs built west of the Rocky Mountains) and to the Stanford Report, Sierra Club again argues that (1) the SAR relies on faulty earthquake data because the data are historical and do not account for recent fracking;[276]

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272. *Id.* at 47.

273. *Id.* at 45.

274. *Id.* at 47, 48.

275. *Id.* at 45-46.

276. *Id.* at 47-48 (citing *id.*, Ex. 7, Letter from Tommy E. Taylor, Director of [Fasken] Oil and Gas Development, to

and (2) the Stanford Report directly contradicts section 2.6.3 of the SAR's assertion "that there are no surface faults at the Holtec site."[277]

We agree with Holtec and the NRC Staff that this contention is inadmissible because Sierra Club fails to show a genuine dispute with the application on a material issue of fact, contrary to 10 C.F.R. § 2.309(f)(1)(vi).[278] Regarding the use of "historical" seismic data from 2016, Sierra Club fails to explain how or where the use of 2016 United States Geologic Survey (USGS) data in the Environmental Report section 3.3.2.1[279] and figure 3.3.4 does not account for recent fracking activity around the proposed storage facility.[280] Section 3.3.2.1 specifically discusses the seismic events southeast of the site in west Texas that may be due to "fluid pressure build-up from fluid injection" (i.e., fracking) as well as recent seismic activity from the late 1990s to the mid-2000s fifty miles west of the site from DOE's Waste Isolation Pilot Plant due to "injection of waste water from natural gas production" (i.e., fracking).[281]

Michael Layton, Director, NMSS (July 30, 2018) (PBRLO Scoping Comments)).

277. *Id.* at 47.

278. Holtec Answer to Sierra Club at 56; NRC Staff Consol. Answer at 86.

279. ER at 3-17.

280. *Id.* at 3-24.

281. *Id.* at 3-17.

In other words, Holtec used the most current information available when it filed its application in 2017, and its analysis did evaluate seismic events related to fracking. Sierra Club has not put forth any information that fracking has caused significant seismic events around the proposed project site in the years since the 2016 USGS report. Therefore, Sierra Club's claim challenging the Environmental Report fails.[282] And Sierra Club's challenge to SAR section 2.6.2's use of USGS 2016 "historical" data and its claims of noncompliance with 10 C.F.R. § 72.103(f)(1) fails for the same reason.[283]

Finally, Sierra Club's claim that the Stanford Report contradicts the SAR's assertion "that there are no surface faults at the Holtec site" is also without merit. We agree with Holtec that there is no dispute between the Stanford Report and the SAR's seismic analyses.[284] When identifying the proposed storage facility's location on Figure 1 of the Stanford Report, it shows that the nearest Quaternary fault is approximately 75 miles from the

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282. As to the claim that Holtec does not address "environmental impacts from earthquakes" in the Environmental Report, Sierra Club Pet. at 45, Holtec's Environmental Report does analyze the HI-STORM UMAX system against credible seismic activity in the region, *see* ER at 4-61 to -65, and concludes that the environmental impact of an earthquake involving storage of spent fuel is small. *Id.* at 4-65, 6-6.

283. SAR at 2-108 to -109.

284. Holtec Answer to Sierra Club at 63.

project site.[285] Moreover, Figure 3 of the Stanford Report shows that the nearest fault of any kind is approximately 40 miles from the site. Although the petitioner need not prove its case at the contention admissibility stage, it must present a genuine dispute with the application on a material fact. Sierra Club has not.[286]

Sierra Club Contention 11 is not admitted.

12. Sierra Club Contention 12

Sierra Club Contention 12 states:

> The dunes sagebrush lizard, a/k/a sand dune lizard, is an endangered species pursuant to New Mexico state law and regulation. The lizard has a limited range and is specifically adapted to sand dune areas with shinnery oak. The site of the Holtec project is within the lizard's habitat range. The [Environmental Report] submitted by Holtec claims that the lizard is not present in the area of the Holtec site, but that assertion is contrary to the scientific

285. *Compare* Stanford Report Fig. 1, *with* Holtec Answer to Sierra Club at 65 (republishing Stanford Report Fig. 1 but marking location of Holtec CISF).

286. Sierra Club's reference to Sierra Club Ex. 7 (PBRLO Scoping Comments) does not raise a genuine dispute with the application on a material issue of fact, because the comments constitute only speculation that fracking will be allowed near and/or immediately beneath the HI-STORE interim storage site.

> evidence. The [Environmental Report] and the subsequent EIS must evaluate the impact of the Holtec project on the dunes sagebrush lizard and its habitat.[287]

Sierra Club challenges sections 3.4.3, 4.4.3, and 4.4.4 of the Environmental Report, questioning the result of surveys that "make no mention of the impact of the project on the lizard or its habitat."[288] Sierra Club also questions the results of a 2016 survey, which refers to a 2007 survey of the same area, both finding "no reptiles in the area of the Holtec site."[289] Sierra Club questions the 2016 survey's methodology, asserting that the length of the 2016 survey was too short (one day), completed at the wrong time (the time of year the lizard allegedly hibernates),[290] and that the survey was based on "casual observation."[291] Sierra Club also states that the 2007 survey results are suspect, as the Eddy-Lea Energy Alliance (ELEA), a vocal supporter of the Holtec project, paid for the 2007 survey, from which Sierra Club infers a conflict of interest.[292] Sierra Club summarizes that Contention 12's "point is that the Holtec site is within the general range of the dunes sagebrush lizard such that the [Environmental Report] should have

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287. Sierra Club Pet. at 48.

288. *Id.* at 49.

289. *Id.*

290. *Id.* at 51.

291. *Id.* at 50.

292. *Id.*

made a more thorough evaluation of the lizard's presence and the impacts to [it] from the Holtec project."[293] Sierra Club submits two maps in support of Contention 12, which purport to show that the proposed fuel storage facility "is likely habitat for the dunes sagebrush lizard."[294]

We agree with Holtec[295] and the NRC Staff[296] that Sierra Club's two maps offered to support Sierra Club Contention 12 do not in fact support Sierra Club's assertion that the sagebrush lizard's habitat is located at the proposed HI-STORE interim storage site. Although the maps roughly show the lizard's habitat in the greater southwestern United States, the maps lack sufficient detail to demonstrate that the sagebrush lizard makes its home at the site of the proposed facility. As Sierra Club's maps do not support what Sierra Club asserts,[297] this aspect of the contention is inadmissible.

Sierra Club's challenges to the methodology of the 2007 and 2016 surveys are not supported by any information that genuinely disputes their sufficiency.

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293. Sierra Club Reply at 33-34.

294. Sierra Club Pet. at 51; *id.* Exs. 8 (Dunes Sagebrush Lizard Habitat Map), 9 (Dunes Sagebrush Lizard Suitable Habitat Expanded Map).

295. Holtec Answer to Sierra Club at 66.

296. NRC Staff Consol. Answer at 89-90.

297. *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90, *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

Sierra Club's broad, unsupported speculations do not meet the Commission's contention admissibility criteria.[298]

Sierra Club Contention 12 is not admitted.

13. Sierra Club Contention 13

Sierra Club Contention 13 states:

> As shown in previous contentions, the Holtec [Environmental Report] is replete with errors, omissions, and blatantly incorrect statements and information. Further, Chapter 12 of the [Environmental Report] shows that a company called Tetra Tech, was the primary preparer of the [Environmental Report]. The only other preparer listed was a subcontracting company that conducted the cultural resource evaluation. Tetra Tech was accused of engaging in widespread fraud with respect to its contract with the United States Navy to clean up radioactive materials at the Hunter's Point Naval Shipyard in San Francisco, California. As such, Tetra Tech's credibility is in question and the credibility of the [Environmental Report] prepared by Tetra Tech likewise is in question.[299]

Sierra Club Contention 13 challenges the credibility of Tetra Tech, the firm that Holtec used to prepare

298. 10 C.F.R. § 2.309(f)(1)(v).

299. Sierra Club Pet. at 51-52.

its Environmental Report. In support, Sierra Club submits an affidavit from an attorney who filed a 10 C.F.R. § 2.206 enforcement petition alleging Tetra Tech's malperformance at Hunter's Point Naval Yard,[300] and also cites its challenges to specific aspects of Holtec's Environmental Report that are proffered as other contentions in this proceeding, *viz*. Sierra Club Contentions 2, 3, 5, 7, 9, 10, 11, and 12.[301]

The proffered contention is inadmissible as it fails to show a genuine dispute with the licensee on a material issue of law or fact.[302] The Commission expects that a dispute regarding character or integrity must raise issues "'"*directly* germane to the challenged licensing action."[303] Sierra Club has not put forth any information that suggests impropriety regarding Tetra Tech's work on the Holtec Environmental Report. Nor has Sierra Club asserted that any Tetra Tech employees involved in the Hunter's Point case were also involved in compiling Holtec's Environmental Report.

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300. *See id.*, Ex. 10, Decl. of Steven J. Castleman (June 26, 2018). *See also* 10 C.F.R. § 2.206 Petition to Revoke Materials License No. 29-31396-01, *Greenaction for Health & Envtl. Justice v. Tetra Tech EC, Inc.* (June 28, 2018) (ADAMS Accession No. ML18178A067).

301. As to those issues cited by Sierra Club, we analyze those separately *supra*.

302. 10 C.F.R. § 2.309(f)(1)(vi).

303. *Millstone*, CLI-01-24, 54 NRC at 366-67 (emphasis added).

Contention 13 is not admitted.

14. Sierra Club Contention 14

Sierra Club Contention 14 states:

> An accurate thermal evaluation of the HI-STORM UMAX system is imperative to ensure that temperatures within the system will not be conducive to corrosion, cladding and other conditions that would adversely impact the safety of the system. The HI-STORM UMAX system is unique, with both air intake and exhaust vents at the top of the containment cask. The SAR for the Holtec [consolidated interim storage] facility does not provide adequate information to determine if the thermal parameters for the HI-STORM system at the Holtec [consolidated interim storage] facility will provide for adequate safety.[304]

Sierra Club claims that, although SAR Chapter 6 purports to discuss thermal evaluations for the UMAX system, it "does not address the problems presented by the fact that the UMAX cask is unique, in that the air intake and exhaust vents are at the top of the cask."[305] Sierra Club claims there is no assurance that "entering and exiting air flows [will] not mix" such that the canister would heat

304. Sierra Club Pet. at 56.

305. *Id.* at 57.

up and degrade the canister's internal cladding.[306] Sierra Club further questions the safety of Holtec's redesign of the UMAX canister shims; the SAR's reliance on the computer code in its thermal calculations; the amount of high burnup fuel that would be stored at the facility and its impact on canister cladding; and Holtec's "recent announcement" that it can place spent fuel in a UMAX canister after being cooled in a spent fuel pool "for only 2.5 years."[307]

The contention is inadmissible as it does not show a genuine dispute exists with the Holtec application on a material issue of law or fact.[308] First, even with Sierra Club's clarification that it seeks to challenge "the discussion in the SAR to determine if the thermal parameters for the HI-STORM system at the Holtec facility will provide for adequate safety,"[309] it is barred from doing so by Commission rules.[310] SAR Chapter 6 fully incorporates by reference the HI-STORM UMAX design and thermal analyses conducted in the HI-STORM UMAX's own Final Safety Analysis Report (FSAR).[311]

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306. *Id.* at 57-58.

307. *Id.* at 58-60.

308. 10 C.F.R. § 2.309(f)(1)(vi).

309. Sierra Club Reply at 37.

310. *See* 10 C.F.R. § 2.335(a); *id.* § 72.46(e).

311. *See* SAR ch. 6 (incorporating by reference Docket 72-1040, Certificate of Compliance No. 1040, "[FSAR] on the HI-STORM UMAX Canister Storage System" (June 2018) (ADAMS Accession No. ML16193A336)).

The HI-STORM UMAX system was added to the list of approved spent fuel storage casks in a March 2015 final rule,[312] and has been subsequently amended by further rulemaking.[313] Therefore, any challenge to the HI-STORM UMAX system design characteristics that are already deemed compliant with Part 72, including those Sierra Club designates in its Contention 14 (i.e., cooling system, thermal evaluations through use of software, and canister shim designs) are barred in this proceeding by sections 2.335 and 72.46(e).

Sierra Club's assertion regarding high burnup fuel also does not raise a genuine dispute with the application, as the SAR clearly states that the multi-purpose canisters to be "stored at [the facility] are limited to those included in the HI-STORM UMAX FSAR."[314] The HI-STORM UMAX FSAR Chapter 4, in turn, prescribes the

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312. List of Approved Spent Fuel Storage Casks: [Holtec] HI-STORM [UMAX] Canister Storage System, Certificate of Compliance No. 1040, 80 Fed. Reg. 12,073, 12,073-78 (Mar. 6, 2015).

313. 10 C.F.R. § 72.214 Certificate Number 1040. *See* Direct Final Rule, List of Approved Spent Fuel Storage Casks: Holtec International HI-STORM UMAX Canister Storage System, Certificate of Compliance No. 1040, Amendment No. 1, 80 Fed. Reg. 53,691 (Sept. 8, 2015); Direct Final Rule, List of Approved Spent Fuel Storage Casks: Holtec International HI-STORM UMAX Canister Storage System; Certificate of Compliance No. 1040, Amendment No. 2, 82 Fed. Reg. 8805 (Jan. 31, 2017).

314. SAR at 4-5.

permissible heat load per storage cell for the allowed canisters at the UMAX (the MPC-37 and MPC-89).[315]

Finally, Sierra Club's passing reference that Holtec will be storing fuel in UMAX canisters that have been cooled less than three years also does not establish a genuine dispute with the application. First, Sierra Club does not offer any evidence of this statement by Holtec. Second, UMAX FSAR table 2.1.1, which is incorporated by reference into the proposed facility's SAR, states a minimum cooling time of three years for both MPC-37 and MPC-89 canisters.[316] Finally, any change to its three year cooling requirements would require Holtec to request an amendment to the Certificate of Compliance, which Holtec has not done.[317] Thus, there is no genuine dispute with the application.[318]

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315. *See*, *e.g.*, FSAR on the HI-STORM UMAX Canister Storage System, Rev. 3 at 4-31 (June 29, 2016) (ADAMS Accession No. ML16193A339) [hereinafter UMAX FSAR].

316. *See* UMAX FSAR tbl. 2.1.1 at 2-25.

317. *See* 10 C.F.R. § 72.244 (application for amendment of a certificate of compliance).

318. Sierra Club also asserted that it should be "allowed to intervene and conduct discovery," Sierra Club Pet. at 59, because the Commission's "SUNSI procedure is onerous, burdensome, lengthy and expensive." Sierra Club Reply at 37. All petitioners in this proceeding were afforded extra time to request the SUNSI (sensitive unclassified non-safeguards) information. *See* Notice of Opportunity to Request a Hearing, 83 Fed. Reg. at 32,922; Order Denying Motions to Dismiss. If counsel for Sierra Club seeks to change the Commission's SUNSI rules, this proceeding is not the forum in which to do so.

Appendix E

Sierra Club Contention 14 is not admitted.

15. Sierra Club Contention 15

Sierra Club Contention 15 states:

> The [Environmental Report] fails to adequately determine whether shallow groundwater exists at the site of the proposed [consolidated interim storage] facility. It is important to make this determination in order to assess the impact of a radioactive leak from the [consolidated interim storage] facility on the groundwater.[319]

Sierra Club bases this contention on the first of five comments in the declaration of George Rice, a groundwater hydrologist.[320] His comment disputes Holtec's finding that no shallow groundwater exists at the proposed site. Mr. Rice explains that Holtec installed five wells on the site: four in the Dockum (the shale, siltstone, and sandstone layer of earth) and one in the alluvial/Dockum interface (where the alluvial layer of earth meets the lower Dockum layer).[321] Although no water or saturated conditions were encountered at the alluvium/Dockum well, Mr. Rice claims that well "represents only one point in the 1040 acre site" and that groundwater could still be present despite the

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319. Sierra Club Pet. at 60.

320. *See id.*, Decl. of George Rice, Comments on Proposed Facility (Sept. 6, 2018) [hereinafter Rice Decl.].

321. *Id.* at 2-3.

materials appearing unsaturated.[322] He asserts that the alluvium/Dockum well "has not been checked for the presence of water since 2007," which is "significant since shallow aquifers may be intermittently saturated."[323] Mr. Rice explains Sierra Club's main concern: "If contaminants leak from the facility, they could be transported by shallow groundwater underlying the site."[324]

Holtec's Environmental Report concludes that "[i] mpacts to groundwater would not be expected, due to the depth of groundwater and the fact that the CIS Facility would not release pollutants, including radionuclides, during normal operations."[325] Nor would a release of radioactive material occur, Holtec's Environmental Report asserts, during any credible off-normal event[326] or accident.[327] Sierra Club disputes the first conclusion—that impacts to groundwater would not be expected

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322. *Id.*

323. *Id.* at 2.

324. *Id.* at 1.

325. ER at 4-13.

326. *Id.* at 4-56.

327. *Id.* at 4-57. Additionally, the HI-STORM UMAX FSAR concludes in section 2.0.6 that "[t]he MPC provides for confinement of all radioactive materials for all design basis normal, off-normal, and postulated accident conditions. As discussed in Chapter 7 of the HI-STORM [flood and wind], [multi-purpose canister] design meets the guidance in the Interim Staff Guidance (ISG)-18 so that leakage of radiological matter from the confinement boundary is non-credible."

due to depth. However, Sierra Club offers no support for its challenge to Holtec's second conclusion—that, in any event, the facility would not release pollutants into groundwater during any credible event.

In its reply, Sierra Club points to its Contentions 9, 14, 20, and 23 as examples of "issues that create a risk of leaks during storage."[328] As discussed elsewhere, we do not admit those contentions, and do not find them to be adequate support for Sierra Club Contention 15. Sierra Club fails to explain why the Environmental Report is wrong to conclude that "[t]here is no potential for a liquid pathway because the [spent nuclear fuel] contains no liquid component and the casks are sealed to prevent any liquids from contacting the [spent nuclear fuel] assemblies"[329] and the interim storage facility's HI-STORM UMAX system would not release any radioactive material even when subjected to "the effects of all credible and hypothetical accident conditions and natural phenomena."[330] As the Commission explained in *Private Fuel Storage*, "[t]o show a genuine material dispute, [a petitioner's] contention would have to give the Board reason to believe that contamination from a defective canister could find its way outside of the cask."[331] Sierra Club has not done this. Sierra Club Contention 15 is not admitted.

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328. Sierra Club Reply at 38.

329. ER at 1-8.

330. *Id.* at 4-62.

331. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 138-39 (2004).

Appendix E

16. Sierra Club Contention 16

Sierra Club's originally-filed Contention 16 stated:

> The [Environmental Report] does not contain any information as to whether brine continues to flow in the subsurface under the Holtec site.[332]

On February 18, 2019, Sierra Club filed a motion to amend Contention 16 to address Requests for Additional Information (RAI) submitted by NRC Staff to Holtec and Holtec's Responses.[333] Sierra Club's amended contention would add two more sentences:

> Holtec has not properly accounted for mechanisms that could allow corrosive material to reach cavity enclosure containers (CECs) and/or spent fuel canisters. Holtec's Aging Management Program would be insufficient to address the problem of groundwater impacting the integrity of the spent fuel containers.[334]

On March 11 and 15, 2019, Holtec and the NRC Staff, respectively, filed responses in opposition to Sierra Club's

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332. Sierra Club Pet. at 62.

333. Sierra Club's Motion to Amend Contention 16 (Feb. 18, 2019) [hereinafter Sierra Club Motion to Amend Contention 16].

334. *Id.* at 9.

motion to amend Contention 16.[335] In its motion, Sierra Club claims that "NRC Staff perspective set forth in RAIs 17-12 and 17-14 presents a context for the Holtec documentation that is materially different than the context in which Holtec had previously presented the discussion of groundwater and its effect on the containers in the CIS facility."[336] Sierra Club points to Holtec's response about brine in RAI 17-12 and about CEC wall thinning in RAI 17-14.[337] According to Sierra Club, because Holtec did not provide this information in its answers to Sierra Club's petition, the information qualifies as new.[338] Sierra Club bases its amended contention on Holtec's responses to the RAIs and on the declaration of Dr. Gordon Thompson, who also supports Sierra Club Contention 2.[339]

For both its original and amended contention, Sierra Club also relies on the second of five comments in George Rice's declaration. This comment explains that "[t]wo brine disposal facilities once operated in the northeast portion of the [proposed] site" and in 2007 a water sample from a spring flowing in that area tested as brine.[340] Mr.

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335. *See* [Holtec's] Opposition to Motion by Sierra Club to Amend Contention 16 (Mar. 11, 2019); NRC Staff Response to Sierra Club Motion to Amend Contention 16 (Mar. 15, 2019).

336. Sierra Club Motion to Amend Contention 16, at 6.

337. *Id.* at 6-7.

338. *Id.*

339. *Id.* at 9.

340. Rice Decl. at 6.

Rice then asks the applicant: "Do the springs/seeps that were flowing in 2007 continue to flow? Is brine moving along perched zones in the alluvial materials, or along the alluvium/Dockum interface? Could the brine come into contact with the canisters?"[341]

As described *supra*, the Board will consider an amended contention filed after the original deadline only if the petitioner demonstrates good cause under the three-pronged test of 10 C.F.R. § 2.309(c)(1). Here, we agree with the NRC Staff and Holtec that Joint Petitioners have failed to demonstrate good cause, because the information upon which they base their amended contention was previously available. As the NRC Staff correctly argues: "The legal standard is not whether Holtec's RAI responses differ from the arguments it raised in its Answer to the Petition, but whether the factual information underpinning Holtec's RAI responses was previously available—for example, in the SAR or [Environmental Report]."[342]

We conclude that Sierra Club has not shown any materially different or new information in Holtec's RAI responses. Dr. Thompson's report primarily restates Holtec's RAI responses verbatim. His substantive comments do not engage with the responses, other than to claim that they "exhibit unwarranted optimism."[343]

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341. *Id.*

342. NRC Staff Response to Sierra Club Motion to Amend Contention 16, at 6.

343. Dr. Gordon R. Thompson Decl. for Sierra Club (Feb. 12, 2019) at 22, 23, 25.

Rather, he focuses on Holtec's alleged failure to analyze climate change[344] and alleged lack of capability to perform credible inspections of spent fuel canisters or CECs.[345] Both of these critiques could have been made at the outset of this proceeding based solely on the SAR. The same is true for Mr. Rice's second comment, because Sierra Club cites the exact same comment as a basis for its originally-filed Contention 16.[346] And pointing to the RAI responses, without more, will rarely provide sufficient support for an admissible contention.[347]

Because Sierra Club has failed to meet the good cause standard under 10 C.F.R. § 2.309(c)(1), we deny Sierra Club's motion to amend Contention 16. Accordingly, we consider Sierra Club Contention 16 as originally filed.

We conclude that Sierra Club does not provide an adequate basis for its single-sentence Contention 16. As Holtec points out, Mr. Rice's Figure 1 and detailed subsurface profiles in the Environmental Report show that the proposed facility would be located above the interface between the alluvium/Dockum, where Mr. Rice suggests that shallow groundwater may exist.[348] Furthermore, the SAR describes how the spent nuclear

344. *Id.* at 22-23.

345. *Id.* at 25.

346. Sierra Club Pet. at 63.

347. *See PPL Susquehanna, LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-15-8, 81 NRC 500, 506 (2015).

348. Holtec Answer to Sierra Club at 85-86.

fuel will be contained in a steel canister within a steel CEC and concludes that "the CEC is a closed bottom, open top, thick walled cylindrical vessel that has no penetrations or openings. Thus, groundwater has no path for intrusion into the interior space of the CEC."[349] Sierra Club does not dispute these conclusions or provide any other reason for how brine could affect the canisters. "[N]either mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention."[350]

Sierra Club Contention 16 is not admitted.

17. Sierra Club Contention 17

Sierra Club Contention 17 states:

> The [Environmental Report] and SAR do not discuss the presence and implications of fractured rock beneath the Holtec site. These fractures could allow radioactive leaks from the [consolidated interim storage] facility to enter groundwater or for the brine described in Contention 16 to corrode the containers contain[ing] the radioactive material.[351]

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349. SAR at 1-14; *id.* at 1-24 (Fig. 1.2.2(a)).

350. *Southern Nuclear Operating Co.* (Early Site Permit for Vogtle ESP Site), LBP-07-3, 65 NRC 237, 253 (2007) (citing *Fansteel*, CLI-03-13, 58 NRC at 203).

351. Sierra Club Pet. at 63-64.

Sierra Club bases this contention on the third of five comments in the declaration of George Rice.[352] Mr. Rice claims that "[f]ractures are common at the site" and that "[s]ome portions of both [the Santa Rosa and Chinle] formations are described as *highly fractured*[] . . . in the logs of monitor wells."[353] He asserts that these fractures "could rapidly convey contaminants to underlying groundwater."[354]

As in its Contentions 15 and 16, Sierra Club does not provide adequate support for its contention. Holtec's Environmental Report concludes: "Impacts to groundwater would not be expected, due to the depth of groundwater and the fact that the CIS Facility would not release pollutants, including radionuclides, during normal operations."[355] Nor would a release of radioactive material occur, Holtec's Environmental Report asserts, during any credible off-normal event[356] or accident.[357]

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352. *See* Rice Decl. at 6.

353. *Id.*

354. *Id.*

355. ER at 4-13.

356. *Id.* at 4-56.

357. *Id.* at 4-57. Additionally, as discussed *supra*, the HI-STORM UMAX FSAR concludes in section 2.0.6 that "[t]he MPC provides for confinement of all radioactive materials for all design basis normal, off-normal, and postulated accident conditions. As discussed in Chapter 7 of the HI-STORM [flood and wind], [multi-purpose canister] design meets the guidance in the Interim Staff Guidance (ISG)-18 so that leakage of radiological matter from the confinement boundary is non-credible."

It also states that "[t]here is no potential for a liquid pathway because the spent fuel contains no liquid component and the casks are sealed to prevent any liquids from contacting the spent fuel assemblies."[358] Holtec's SAR concludes that "the CEC is a closed bottom, open top, thick walled cylindrical vessel that has no penetrations or openings. Thus, groundwater has no path for intrusion into the interior space of the CEC."[359] Sierra Club does not explain why these conclusions are false or questionable, such that contaminants could be conveyed to underlying groundwater. In its reply, Sierra Club does not elaborate on a rationale for its contention except to offer the conclusory statement that "[t]here is sufficient information to raise the specter of leaks from the casks into the groundwater."[360] "[N]either mere speculation nor bare or conclusory assertions, even by an expert, alleging that a matter should be considered will suffice to allow the admission of a proffered contention."[361]

Sierra Club Contention 17 is not admitted.

18. Sierra Club Contention 18

Sierra Club Contention 18 states:

> The Santa Rosa Formation is an important aquifer in the area of the Holtec site. It is used

358. *Id.* at 7-1.

359. SAR at 1-14; *id.* at 1-24 (Fig. 1.2.2(a)).

360. Sierra Club Reply at 39.

361. *Vogtle*, LBP-07-3, 65 NRC at 253 (citing *Fansteel*, CLI-03-13, 58 NRC at 203).

> for domestic water supply, stock watering and irrigation. The Holtec [Environmental Report] has not adequately determined and discussed the possibility that waste-contaminated groundwater could reach the Santa Rosa Formation.[362]

Sierra Club bases this contention on the fourth comment in the declaration of George Rice.[363] His fourth comment states that "the top of the Santa Rosa [Formation] is approximately 215 feet below land surface."[364] It also describes how Holtec's monitor well B101 is located in the Santa Rosa Formation, and "the depth to water in the well is about 250 feet. The quality of this water has not been determined."[365] Mr. Rice claims that "the possibility that waste-contaminated groundwater could reach the Santa Rosa Formation cannot be dismissed."[366]

We agree with Holtec that Sierra Club has put "forth an unsupported hypothetical and demand[ed] that the applicant prove the negative."[367] While it may be true

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362. Sierra Club Pet. at 65.

363. Rice Decl. at 7.

364. *Id.* (citing GEI Consultants, HI-STORE CISF Phase 1 Site Characterization, Lea County, New Mexico at 80 (Dec. 2017) [hereinafter GEI]).

365. *Id.* (citing GEI at 36).

366. *Id.*

367. Holtec Answer to Sierra Club at 89.

that the Santa Rosa Formation is an important source of groundwater located in Lea County,[368] Sierra Club has not demonstrated any support for its claim that waste-contaminated groundwater from the proposed facility could reach that formation. As explained *supra*, Holtec's Environmental Report concludes: "Impacts to groundwater would not be expected, due to the depth of groundwater and the fact that the CIS Facility would not release pollutants, including radionuclides, during normal operations"[369] or during any credible off-normal event[370] or accident.[371]

Sierra Club appears to implicitly dispute the second conclusion—that the proposed facility would not release pollutants into groundwater. However, Sierra Club does not provide any rationale to support its expert's conclusory statements or explain why the Environmental Report is wrong to conclude that "[t]here is no potential for a liquid pathway because the spent fuel contains no liquid component and the casks are sealed to prevent any liquids from contacting the spent fuel assemblies."[372]

Sierra Club Contention 18 is not admitted.

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368. ER at 3-59 to -60.

369. *Id.* at 4-13.

370. *Id.* at 4-56.

371. *Id.* at 4-57.

372. *Id.* at 7-1.

Appendix E

19. Sierra Club Contention 19

Sierra Club Contention 19 states:

> Holtec performed two sets of packer tests in the Santa Rosa Formation to estimate the hydraulic conductivity (permeability) of the formation. These tests were conducted in conjunction with the preparation of the [Environmental Report]. It does not appear from the report of Holtec's consultant that these tests were conducted properly. Therefore, the [Environmental Report] has not presented an adequate evaluation of the affected environment.[373]

Sierra Club bases this contention on the fifth and final comment in the declaration of George Rice. His comment describes how Holtec performed two sets of packer tests in the Santa Rosa.[374] He claims that Holtec allegedly did not follow three of the recommendations in the U.S. Bureau of Reclamation's Field Manual: (1) "the applicant does not appear to have cleaned the hole before conducting packer tests;" (2) "there is no description of the water used in the tests;" and (3) "the test duration appears to be too short."[375] Accordingly, Sierra Club claims that "the results of the packer tests are unreliable and do not satisfy the requirements of 10 C.F.R. § 51.45."[376]

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373. Sierra Club Pet. at 66.

374. Rice Decl. at 8.

375. *Id.* (citing 2 U.S. Bureau of Reclamation, Engineering Geology Field Manual, ch. 17 (2d ed. 2001)).

376. Sierra Club Pet. at 67.

We agree with the NRC Staff[377] and Holtec[378] that Sierra Club fails to show how this contention is material, because it has failed to show how the results of the packer tests would make a difference in the outcome of the licensing proceeding. Mr. Rice admitted in his declaration that "even when the tests are done properly, the values obtained are only semi-quantitative—within an order of magnitude of the actual value."[379] Although Sierra Club asserts that "[t]he permeability of the site is certainly important to assessing whether the site is appropriate for the proposed CIS facility,"[380] Sierra Club does not describe how the permeability is material or how the asserted departures from the U.S. Bureau of Reclamation's recommendations would have significance for any analysis or conclusion in the Environmental Report. Presumably, Sierra Club is implicitly expressing the same concern as Contentions 15 through 18—that groundwater may become contaminated—but, as we explained *supra*, Sierra Club never links its concern about groundwater with an explanation for how groundwater could possibly come into contact with any contaminant from the storage facility. Mr. Rice merely speculates that the acceptable guidance may not have been followed.[381] Again, speculation, even

377. NRC Staff Consol. Answer at 106-07.

378. Holtec Answer to Sierra Club at 90-91.

379. Rice Decl. at 8.

380. Sierra Club Pet. at 66.

381. Rice Decl. at 8 ("[T]he applicant *does not appear* to have followed several of the recommen-dations in the manual.") (emphasis added).

by an expert, fails to provide the requisite support for an admissible contention.[382]

Sierra Club Contention 19 is not admitted.

20. Sierra Club Contention 20

Sierra Club Contention 20 states:

> Since the 1990's almost all spent nuclear fuel being generated is high burnup fuel (HBF). HBF causes the cladding to become thinner, creating a higher risk of release of radioactive material. The cladding also becomes more brittle, with additional cracks. This situation causes risks to short-term and long-term dry storage. This issue is not adequately addressed in the SAR and high burnup fuel does not appear to be addressed in the [Environmental Report] at all. Cladding failure due to high burnup fuel is an issue that must be adequately addressed.[383]

Sierra Club's Contentions 20 through 24 concerning high burnup fuel are supported by Dr. Marvin Resnikoff, who asserts expertise in radioactive waste.[384]

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382. *Vogtle*, LBP-07-3, 65 NRC at 253 (citing *Fansteel*, CLI-03-13, 58 NRC at 203).

383. Sierra Club Pet. at 67.

384. *See id.*, Resnikoff Aff. ¶ 3.

Appendix E

Sierra Club proffers Contention 20 based on the assertion that, because "[h]igh burnup fuel causes the cladding around the fuel to become thinner and more brittle, inducing cracking," high burnup fuel containers are "more likely to leak radioactive material."[385] Arguing that high burnup fuel is "dangerously unpredictable and unstable in storage," Sierra Club cites a 2013 DOE report that suggests outstanding issues regarding cladding and high burnup fuel should be resolved before this fuel type can be safely loaded, transported, and stored.[386] Citing a 2010 study by the U.S. Nuclear Waste Technical Review Board,[387] Sierra Club claims that zirconium cladding experiences a twelve percent thinning due to the effects of high burnup, and "the likelihood of cladding defects increase" when storing high burnup fuel.[388] In sum, Sierra Club argues the Environmental Report and SAR must "discuss and evaluate the risks of transporting and storing [high burnup fuel]."[389]

To the extent Sierra Club Contention 20 raises safety claims concerning transportation and storage, it

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385. Sierra Club Pet. at 67-68.

386. *Id.* at 68-69 (citing DOE, *A Project Concept for Nuclear Fuels Storage and Transportation, Fuel Cycle Research & Development*, (rev. 1 June 2013)).

387. U.S. Nuclear Waste Transp. Review Bd., *Evaluation of the Technical Basis for Extended Dry Storage and Transportation of Used Nuclear Fuel* (Dec. 2010).

388. Sierra Club Pet. at 70.

389. *Id.*

is inadmissible because it fails to raise a genuine dispute with the application on a material issue of law or fact. First, Part 71 and U.S. Department of Transportation regulations establish the standards for transporting spent nuclear fuel—not for storing fuel at an interim storage facility. This aspect of the contention does not raise a genuine dispute with Holtec's Part 72 license application. Moreover, regarding storage of high burnup fuel (and consistent with our conclusion in connection with Sierra Club's related Contention 14 *supra*), the analyses and bounding technical specifications are contained in HI-STORM UMAX's FSAR and Certificate of Compliance, which is incorporated by reference into the HI-STORE facility's SAR.[390] As Commission regulation bars any admitted contention based on an NRC-approved storage cask design incorporated by reference in an ISFSI application,[391] this facet of Sierra Club Contention 20 is inadmissible.

The claim that Holtec's Environmental Report fails to address high burnup fuel in transport also does not raise a genuine dispute because it ignores the application. Environmental Report section 4.9[392] provides the results of a RADTRAN analysis that evaluated the incident-free radiological transportation impacts assuming the maximum dose rate allowed for exclusive use shipments under NRC regulation 10 C.F.R. § 71.47(b)(3). This would

390. *See*, *e.g.*, SAR at 16-1.

391. *See* 10 C.F.R. § 72.46(e).

392. ER at 4-30.

encompass spent fuel of any burnup, including high burnup fuel. With respect to potential impacts to transportation workers and the radiological transportation impacts that could potentially occur during accidents, ER section 4.9 bases its analyses on DOE calculations concerning incident-free and accident radiological impacts in the Yucca Mountain final supplemental EIS,[393] which in turn addresses the transportation of high burnup fuel.

Finally, the claim that storage of high burnup fuel is omitted from Holtec's Environmental Report also raises no genuine dispute. Sections 4.12 and 4.13 of the Environmental Report, which concern public and occupational health from normal operations and off-normal operations and accidents, speak to the storage of high burnup fuel.[394] As there are no separate regulatory requirements regarding high burnup fuel, section 4.12 relies on the Continued Storage GEIS in its analyses of dose to the public and its workers.[395] Section 4.13 specifically incorporates by reference the UMAX FSAR, which addresses credible accidents and high burnup fuel.[396] Therefore, to the extent the contention asserts that Holtec omitted discussion of high burnup fuel storage, it is

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393. DOE, Final Supplemental EIS for a Geological Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada, DOE/EIS-0250F-S-1, at G-34 (June 2008).

394. ER 4-16 to -17, 4-46 to -48.

395. *Id.* at 4-48.

396. *Id.* at 4-61.

inaccurate. A contention of omission must be summarily rejected if "the topic that allegedly is omitted is, in fact, included with the application."[397]

Sierra Club Contention 20 is not admitted.

21. Sierra Club Contention 21

Sierra Club Contention 21 states:

> There is no experimental support for the safe transportation and storage of [High Burnup Fuel]. Holtec must show that safety is assured not only for hypothetical accident conditions, but also for real life accident conditions. Holtec has not done that in this case.[398]

Sierra Club argues that, under section 72.108, "the transportation of [high burnup fuel] especially must be addressed in the [Environmental Report]."[399] Sierra Club's basis for the contention is that there is a lack of data concerning high burnup fuel transportation guidance for applicants to meet certain Part 71 requirements.[400]

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397. *USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 456 (2006).

398. Sierra Club Pet. at 70.

399. *Id.* at 71.

400. *Id.* at 70.

Citing NRC Interim Staff Guidance 11 (ISG-11)[401] in which the NRC Staff sets a "case-by-case" standard for the transportation of high burnup fuel, Sierra Club broadly claims that Holtec "has not met this test."[402] Sierra Club then points out issues with the ISG-11 document itself, stating that, although the Staff is still reviewing data on high burnup fuel and cladding issues vis-à-vis transportation, there is a question concerning what exactly the Staff's methodology is.[403] Ultimately, Sierra Club wants Holtec's Environmental Report to "address real life accident conditions based on the specific facts of this case."[404]

Although the wording of Contention 21 mentions "safe transportation and storage," none of the supporting bases or facts on which Sierra Club relies address storage at all. Thus, the storage portion of Contention 21 is inadmissible for failure to cite any alleged facts or expert opinion on which Sierra Club would rely at an evidentiary hearing.[405]

The remainder of the contention is inadmissible because it fails to raise a genuine dispute on a material issue with Holtec's application for a consolidated interim

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401. Spent Fuel Project Office, NMSS, Interim Staff Guidance, Cladding Considerations for the Storage and Transportation of Spent Fuel (Nov. 17, 2003).

402. Sierra Club Pet. at 71-72.

403. *Id.* at 71.

404. *Id.* at 72.

405. 10 C.F.R. § 2.309(f)(1)(v).

storage facility. Again, Sierra Club declines to grapple with the application at hand—Holtec's HI-STORE application to store spent fuel under Part 72—and instead it broadly asserts that Holtec does not meet a "case-by-case" transportation standard for high burnup fuel transportation (as set forth in an NRC non-binding guidance document). Sierra Club also fails to specifically explain how Holtec fails to meet this standard. Bald assertions that an application is insufficient or inadequate, without more, do not meet the Commission's contention admissibility standard.[406]

Sierra Club Contention 21 is not admitted.

22. Sierra Club Contention 22

Sierra Club Contention 22 states:

> With high burnup fuel hydrogen absorption into the Zircaloy metal can lead to hydrogen embrittlement (loss of cladding ductility) of the cladding. Vibrations during transport will lead to further degradation of the cladding. Nothing in the Holtec documentation shows that Holtec has addressed this issue in this case.[407]

Reflecting its continuing concern with the transport of high burnup fuel, Sierra Club alleges that Holtec's

406. *Nuclear Management Co.* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 341, *aff'd*, CLI-06-17, 63 NRC 727 (2006)).

407. Sierra Club Pet. at 72.

Environmental Report "has not adequately made the evaluation of the loss of ductility on the fuel rods due to the [high burnup fuel] and the likelihood of material strength and a release of radioactive material" in accordance with 10 C.F.R. § 72.108.[408] Arguing that hydrogen absorption into the zircaloy cladding (hydrides) can lead to cladding embrittlement, Sierra Club claims that this ultimately could "lead to delayed hydride cracking."[409] Finally, Sierra Club reasserts its claim from Contention 21 that Holtec does not meet the spent fuel transportation "case-by-case" test set forth in ISG-11, and that the Environmental Report must address "real life accident conditions."[410]

As with Contention 21, Sierra Club Contention 22 is inadmissible for failure to raise a genuine dispute with the application on a material issue of law or fact. We agree with the NRC Staff's assessment that, while section 72.108 requires the applicant to consider impacts from transportation in the Environmental Report, "it does not require that the environmental report prove the safety of transportation packages."[411] Moreover, the Commission's Part 71 regulations already address and preempt the

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408. *Id.* at 72-73.

409. *Id.* at 73 (quoting Chan, *An Assessment of Delayed Hydride Cracking in Zirconium Alloy Cladding Tubes Under Stress Transients* (2006)).

410. *Id.*

411. NRC Staff Consol. Answer at 116.

issues Sierra Club seeks to litigate in this contention.[412] And Sierra Club's identical argument concerning the "case-by-case" test in ISG-11 is inadmissible for the same reason we found it inadmissible in Contention 21.

Sierra Club Contention 22 is not admitted.

23. Sierra Club Contention 23

Sierra Club Contention 23 states:

> Spent fuel cladding must be protected during storage against degradation that leads to gross ruptures in the fuel or the fuel must be otherwise confined such that the degradation of the fuel during storage will not pose operational safety problems with respect to its removal from storage. It is the responsibility of the licensee to ensure that fuel placed in dry storage meets the design-basis conditions. If [high burnup fuel] develops gross cladding defects during transportation, Holtec has not described how such defects could be detected. If [high burnup fuel] develops gross cladding defects and the fuel cannot be accepted at a waste repository, the fuel will remain at the proposed [consolidated interim storage] facility indefinitely.[413]

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412. *See* 10 C.F.R. § 71.71(c)(1)(5) (vibration incident to transport of spent fuel); *id.* § 71.73 (analyses of required transport accident conditions).

413. Sierra Club Pet. at 73-74.

Citing 10 C.F.R. § 72.122(h)(1), Sierra Club argues that Holtec must protect the spent fuel cladding "against degradation that leads to gross ruptures in the fuel or the fuel must be otherwise confined such that the degradation of the fuel during storage will not pose operational safety problems" when the fuel is retrieved from storage.[414] Sierra Club then asserts that Holtec "has not specified how it will address the safety issues inherent in the gross cladding defects due to [high burnup fuel]."[415] Sierra Club also claims that Holtec has not described how either of these defects will be detected if they occur during transportation or how the high burnup fuel will be managed once that fuel is "transported to a repository."[416]

Contention 23 cannot be admitted because it fails to show that a genuine dispute exists with the Holtec application on a material issue of law or fact. First, Sierra Club does not identify which part of the application it disputes, as specifically required.[417] Second, Sierra Club does not address the analyses that support Holtec's claim that it does comply with section 72.122(h)(1), which are provided in the FSAR for the HI-STORM UMAX system and incorporated by reference in Holtec's SAR.[418] And

414. *Id.* at 74.

415. *Id.*

416. *Id.* at 75.

417. 10 C.F.R. § 2.309(f)(1)(vi).

418. *See*, *e.g.*, SAR Ch. 6 (incorporating by reference Docket No. 72-1040, Certificate of Compliance No. 1040, "[FSAR] on The HI-STORM UMAX Canister Storage System" (June 2018) (ADAMS Accession No. ML16193A336)).

as Holtec points out, the HI-STORM UMAX system has already been certified by the NRC through its independent analyses and publication of its own Safety Evaluation Report (SER).[419] Indeed, the NRC Staff in 2015 concluded that fuel stored in the UMAX system would be maintained at a temperature below ISG-11 Revision 3 standards (i.e., below 400°C) and accordingly determined that the system complied with section 72.122(h)(1) as it relates "to thermal analysis, fuel cladding integrity and fuel retrievability."[420] As the HI-STORE UMAX canister system has already been certified compliant by the NRC,[421] a petitioner is barred by regulation from challenging either the Staff's SER or the UMAX SAR analyses in an adjudication.[422]

Sierra Club Contention 23 is not admitted.

24. Sierra Club Contention 24

Sierra Club Contention 24 states:

> Because of the high heat output of fuel within MPC-37 canisters, there is a long decay time

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419. Holtec Answer to Sierra Club at 113-14 (citing SER, Docket No. 72-1040, HI-STORM UMAX Canister Storage System, Holtec, Certificate of Compliance No. 1040, at 15 (Apr. 2015) (ADAMS Accession No. ML15093A510) [hereinafter HI-STORM UMAX SER]).

420. HI-STORM UMAX SER at 4-5, -19, -22 to -23, -37.

421. 10 C.F.R. § 72.214 (Certificate Number 1040).

422. *Id.* § 72.46(e).

> before shipments to the Holtec [consolidated interim storage] facility can occur. The loading of the MPC-37 is quite complicated. It is unclear when reactors will be allowed to ship the MPC-37 to the Holtec facility. There is a serious risk of radioactive contamination if the radioactive waste is shipped too soon. Information that would inform the public and analysts has been withheld as being proprietary information. Neither the Holtec [Environmental Report] or SAR contain sufficient information to assess the risk of shipping the MPC-37 canisters.[423]

Sierra Club claims that "Holtec has not provided sufficient information in the [Environmental Report] or SAR to make an accurate assessment of the safety of the [MPC-37 canisters for high burnup fuel]."[424] Sierra Club also contends that it was not permitted to access information about the MPC-37 canister or the HI-TRAC CS cask because Holtec withheld the information as proprietary.[425]

As emphasized throughout this Memorandum and Order, Holtec has applied for a license to construct and operate a Holtec HI-STORE UMAX spent fuel storage installation—not a license for it to transport canisters or casks. Nor is Holtec applying for permission to use

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423. Sierra Club Pet. at 75-76.

424. *Id.* at 76.

425. *Id.* at 76, 80.

or certify Holtec canisters or casks for transport, as those proposed for use at the HI-STORE facility have already been reviewed by the NRC and have been issued certificates of compliance. Thus, a contention challenging any aspect of an NRC-approved canister or cask is outside the scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii), and would be an impermissible attack on the Commission's regulations absent a waiver under section 2.335.

As to Sierra Club's claim that proprietary information was withheld that prejudiced petitioners, the claim is not an admissible contention under any standard. We again observe that the *Federal Register* notice announcing the opportunity to petition for a hearing in this proceeding set forth a procedure for petitioners to obtain proprietary information.[426] The Secretary of the Commission also granted an extension of time for petitioners to do so,[427] but Sierra Club still did not avail itself of the procedure.

Sierra Club Contention 24 is not admitted.

25. Sierra Club Contention 25

Sierra Club's Contention 25 states:

> Sierra Club adopts all contentions presented by Don't Waste Michigan, Citizens Against

426. *See* Notice of Opportunity to Request a Hearing, 83 Fed. Reg. at 32,919.

427. *See* Order of the Secretary (Aug. 20, 2018) (extending petitioners' requests to access SUNSI to August 30, 2018).

> Chemical Contamination, Public Citizen, San Luis Obispo Mothers for Peace, Nuclear Energy Information Service, Citizens' Environmental Coalition, and Environmentalists, Inc. in their Petition to Intervene in this proceeding.[428]

To adopt a contention, a participant must (1) have demonstrated standing in their own right; and (2) have proffered an admissible contention itself.[429] Because Sierra Club has not proffered an admissible contention itself, it cannot adopt any of Joint Petitioners' contentions.

Sierra Club Contention 25 is not admitted.

26. Sierra Club Contention 26

Sierra Club Contention 26 states:

Section 186 of the Atomic Energy Act (AEA) (42 U.S.C. § 2236) provides that a license issued by the NRC may be revoked for any material false statement in the license application. Holtec has made a material false statement in its license application in this case by stating repeatedly that title to the waste to be stored at the [consolidated interim storage] facility would be held by DOE and/or the nuclear plant owners. This false statement was repeated in Holtec's Answers to Sierra Club's Contention 1 and [Joint Petitioners'] Contention 2.

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428. Sierra Club Pet. at 82.

429. *See Consolidated Edison Co. of New York* (Indian Point, Units 1 and 2), CLI-01-19, 54 NRC 109, 132-33 (2001).

The statement that nuclear plant owners might retain title to the waste is shown to be false by a January 2, 2019, e-mail message from Holtec to the public titled "Reprising 2018[.]" "Reprising 2018" states, "While we endeavor to create a national monitored retrievable storage location for aggregating used nuclear fuel at reactor sites across the U.S. into one (HI-STORE CISF) to maximize safety and security, its deployment will ultimately depend on the DOE and the U.S. Congress."

Thus, if a false statement such as Holtec has made in its filing in this case is grounds for revoking a license, it is grounds for not issuing the license in the first instance.[430]

On January 17, 2019, Sierra Club filed a motion to submit this new contention.[431] Because Sierra Club Contention 26 was submitted after the deadline for filing petitions,[432] we must first consider whether Sierra Club's motion to file the contention satisfies the three-prong test in 10 C.F.R. § 2.309(c)(1)(i)-(iii). Although Holtec argues

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430. Sierra Club's Motion to File a New Late-Filed Contention (Jan. 17, 2019) [hereinafter Sierra Club's Late-Filed Contention 26 Motion]; Sierra Club Contention 26 (Jan. 17, 2019) [hereinafter Sierra Club Contention 26].

431. Sierra Club's Late-Filed Contention 26 Motion; *see* Sierra Club Contention 26.

432. *See* Notice of Opportunity to Request a Hearing, 83 Fed. Reg. at 32,919 (establishing September 14, 2018 as the deadline for hearing requests and petitions to intervene).

to the contrary,[433] the contention clearly satisfies two of them. It is undisputed that the e-mail on which the contention relies was not publicly available until January 2, 2019.[434] Likewise there is no dispute that Sierra Club timely submitted Contention 26 on January 17, 2019—just 15 days later.[435]

Less clear is whether Contention 26 relies on information that is "materially different from information previously available."[436] Both Holtec and the NRC Staff argue it is not.[437] Holtec goes one step further and asks us to refuse even to consider the admissibility of Sierra Club Contention 26 because, Holtec argues, "Petitioners[']gross mischaracterizations of the statement in the Holtec article belie any finding of good cause under the late-filing requirements in 10 C.F.R. § 2.309(c)."[438]

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433. *See* Holtec Opposition to Late-Filed Sierra Club Contention 26 and [Joint Petitioners] Contention 14 (Feb. 19, 2019) at 2-6 [hereinafter Holtec Opp. to Late-Filed Contentions].

434. *See* Sierra Club's Motion to File a New Late-Filed Contention (Jan. 17, 2019), attach. Ex. 11, *Holtec Highlights*, Holtec Reprising 2018 (Jan. 2, 2019) [hereinafter Reprising 2018 E-mail].

435. *See Shaw AREVA MOX Servs.*, LBP-08-11, 67 NRC at 493 (30 days deemed timely).

436. 10 C.F.R. § 2.309(c)(1)(ii).

437. Holtec Opp. to Late-Filed Contentions at 4-6; NRC Staff 's Consolidated Response to [Joint Petitioners], and the Sierra Club's Motions to File New Contentions (Feb. 19, 2019) at 7-8 [hereinafter NRC Staff Response to Late-Filed Contentions].

438. Holtec Opp. to Late-Filed Contentions at 4.

Both Holtec and the NRC Staff, in our view, wrongly conflate the ""materially different" requirement of 10 C.F.R. § 2.309(c)(1)(ii) (necessary to file a contention after the initial deadline) with the "material to the findings the NRC must make" requirement of 10 C.F.R. § 2.309(f)(1)(iv) (necessary to admit a contention). As frequently stated, the NRC's pleading requirements differ markedly from those in most courts because "notice pleadings" are not permitted.[439] Rather, the scope of a contention is limited to issues of law and fact pled with particularity,[440] unless the contention is properly amended in accordance with the NRC's rules.

A corollary to the NRC's strict pleading requirements, however, is that the Agency may place petitioners in a quandary: What new information requires amending a contention or pleading a new one, on the one hand, and what merely constitutes new evidence that may be introduced in support of an existing contention? A petitioner who guesses wrong may find its evidence or its line of argument excluded from an evidentiary hearing.

Accordingly, in deciding whether to permit a contention to be filed after the initial deadline, we interpret "materially different" new information from the standpoint of a reasonable petitioner. Holtec's statement

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439. *North Atlantic Energy Service Corp.* (Seabrook Station, Unit 1), CLI-99-6, 49 NRC 201, 219 (1999).

440. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-15, 71 NRC 479, 482 (2010).

in "Reprising 2018" concerning the role of DOE and the Congress in deployment of the proposed facility meets this standard because it appears to contradict information in the application. We do not demand that a petitioner establish the admissibility (much less the merits) of a contention before allowing it to be filed. Sierra Club's motion to file Contention 26 is granted for cause.

That said, we agree with Holtec and the NRC Staff that Sierra Club Contention 26 is not admissible.[441]

Holtec's "Reprising 2018" e-mail message stated that deployment of the planned facility "will ultimately depend on the DOE and the U.S. Congress."[442] Contention 26, therefore, claims Holtec made a material false statement in its license application when it said title to the spent fuel stored in the facility would be held either by DOE or by the nuclear plant owners.[443] Holtec's statement in "Reprising 2018," Sierra Club contends, is an admission that Holtec really has no intention of contracting with nuclear plant owners. Rather, Sierra Club asserts, Holtec intends to go forward with the project only if it can contract with DOE (which, both Holtec and Sierra Club agree, with limited exceptions would currently be unlawful).[444]

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441. *See* Holtec Opp. to Late-Filed Contentions at 6-13; NRC Staff Response to Late-Filed Contentions at 8-11.

442. Reprising 2018 E-mail at 1.

443. *See* Sierra Club Contention 26 at unnumbered p. 1.

444. *See supra* discussion at Sierra Club Contention 1.

Consequently, Contention 26 asserts, Holtec's license application should be denied. Because section 186 of the AEA[445] provides that an NRC license may be revoked for a material false statement in the license application, Sierra Club argues, it likewise should be grounds for not issuing a license in the first place.

Assuming section 186 of the AEA applies,[446] however, Contention 26 does not set out a possible violation. Contrary to Sierra Club's arguments, a violation of section 186 requires a willful misrepresentation.[447] Nothing in "Reprising 2018" demonstrates a misrepresentation in Holtec's license application, willful or otherwise.

On the contrary, Holtec's revised application unambiguously states that construction will be undertaken

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445. 42 U.S.C. § 2236.

446. Holtec contends that, prior to the issuance of a license, only section 182 of the AEA (42 U.S.C. § 2232) should apply, rather than section 186. *See* Holtec Opp. to Late-Filed Contentions at 12-13. The NRC Staff 's response does not address the issue. For purposes of determining whether Contention 26 is admissible, we assume *arguendo* that Sierra Club properly invokes section 186.

447. Before 1987, the Commission used the standard set forth in the pre-1987 cases on which the Sierra Club relies. *See* Sierra Club Contention 26 at unnumbered pp. 7-8. But, in a 1987 rulemaking, the Commission reversed its prior policy. Whereas previously a material false statement under section 186 could be "unintended and inadvertent," the Commission determined in 1987 to limit the term to "egregious situations" involving an element of intent. Completeness and Accuracy of Information, 52 Fed. Reg. 49,362, 49,363-65 (Dec. 31, 1987).

only after it has established "a definitive agreement with the prospective user/payer for storing the used fuel (USDOE and/or a nuclear plant owner)."[448] Sierra Club claims, and Holtec agrees, that with certain limited exceptions DOE may not lawfully take title to spent nuclear fuel under current law.[449] Therefore, Holtec's application describes two alternative types of customers: DOE and the nuclear plant owners themselves.

Holtec readily acknowledges that it hopes Congress will change the law, and allow it in most instances to contract directly with DOE to store spent fuel.[450] Additionally, as Holtec points out, the eventual development of a permanent national nuclear waste repository, as contemplated by the NWPA, might eliminate the need for some or all of the planned stages of Holtec's proposed interim storage facility.[451] Nothing in "Reprising 2018" is inconsistent with this state of affairs.

Meanwhile, Holtec represents that it is committed to going forward with the project by contracting directly with nuclear plant owners that currently hold title to their spent fuel.[452] We have no reason to assume that, having

448. SAR at 1-6. (As discussed *supra*, Holtec has corrected an erroneous inconsistency that initially appeared in Revision 1 of its Environmental Report).

449. *See supra* Section IV.B.1.

450. Tr. at 250.

451. Tr. at 246.

452. Tr. at 248.

acknowledged on the record that (with limited exceptions) it would be unlawful to contract directly with DOE under the NWPA as currently in effect, Holtec will nonetheless try to do just that.[453] Nor may we assume that DOE would be complicit in a violation of the NWPA.[454]

Whether Holtec will find the alternative of contracting with the nuclear plant owners to be commercially viable is not an issue before the Board, because the business decision of whether to use a license has no bearing on a licensee's ability to safely conduct the activities the license authorizes. As the Commission instructs us, "the NRC is not in the business of regulating the market strategies of licensees or determining whether market conditions warrant commencing operations."[455]

Sierra Club Contention 26 is not admitted.

27. Sierra Club Contention 27

Sierra Club Contention 27 states:

During the hearing before the ASLB in this case that occurred on January 23 and 24, 2019, Holtec relied on its

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453. *See*, *e.g.*, *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001) ("Further, in the absence of evidence to the contrary, the NRC does not presume that a licensee will violate agency regulations wherever the opportunity arises.").

454. *See*, *e.g.*, *Chemical Foundation*, 272 U.S. at 14-15; *Armstrong*, 517 U.S. at 464.

455. *Nat'l Enrichment Facility*, CLI-05-28, 62 NRC at 726 (internal quotation marks omitted).

purported Aging Management Program, SAR Chapter 18, to support its claim that there is no issue with high burnup fuel, as set forth in Sierra Club Contentions 14 and 20-23. Holtec had not replied upon, or even mentioned, the Aging Management Program in its Answer to Contentions 14 and 20-23, which raise issues regarding high burnup fuel. This is new information that was not available to Sierra Club until Holtec relied upon the Aging Management Program at the ASLB hearing.

Holtec's Aging Management Program, SAR Chapter 18, only mentions high burnup fuel once, in Section 18.3. The Aging Management Program does not explain how the impact to the containers from high burnup fuel will be addressed. The reference simply refers to Appendix D of NUREG-1927, which provides a process for experimental demonstration for time periods beyond a 20-year licensing period.

The ER does not mention the Aging Management Program at all.

Since the Holtec [consolidated interim storage] facility is expected to be in operation well beyond the 40-year licensing period, the Aging Management Program in the SAR, if it proposes to comply with Appendix D, must set out in detail how it will do so.[456]

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456. Sierra Club's Additional Contentions in Support of Petition to Intervene and Request for Adjudicatory Hearing (Feb. 25, 2019) at 1 [hereinafter Sierra Club Additional Contentions]; *see also* Sierra Club's Motion to File New Late-Filed Contentions 27, 28, and 29.

Sierra Club relies on three documents to support its point that an "aging management program must be based on more tha[n] hope and a promise."[457] First is DOE guidance entitled "Managing Aging Effects on Dry Cask Storage Systems for Extended Long-Term Storage and Transportation of Used Fuel-Revision 2," which refers to four types of aging management programs and ten elements that should be included in the programs.[458] Second is a portion of NRC guidance document, NUREG-1748, which describes what mitigation measures an applicant should describe in an environmental report.[459] Third is a report by Robert Alvarez that describes the alleged difficulty of monitoring decay heat from high burnup fuel.[460] Sierra Club also disputes Holtec's assertion at oral argument that its aging management program is not voluntary, since Holtec "apparently gets to fashion its own program" and "there is no indication that there will be any NRC oversight of Holtec's execution of the program."[461]

Because this contention was submitted after the original deadline, we first determine whether the contention satisfies 10 C.F.R. § 2.309(c). As explained

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457. Sierra Club Additional Contentions at 4.

458. *Id.*

459. *Id.* at 7.

460. *Id.*; *see also id.*, attach., Expert Report and *Curriculum Vitae* of Robert Alvarez (Feb. 25, 2019). As noted *infra*, Mr. Alvarez purports to have significant experience in the areas of nuclear materials and policy development.

461. Sierra Club Additional Contentions at 6.

supra, the Board will consider a new or amended contention filed after the deadline only if the petitioner demonstrates good cause under the three-pronged test of 10 C.F.R. § 2.309(c)(1). We agree with the NRC Staff and Holtec that Sierra Club's Contention 27 fails to meet the first prong,[462] and conclude that Sierra Club could have made this challenge to the aging management program in its initial petition. Sierra Club does not assert that the information about Holtec's aging management program is new or materially different than the information in Holtec's application, only that it has been used in a new way that Sierra Club did not anticipate. The DOE and NRC guidance documents upon which Sierra Club relies as the basis for this contention were available at the time that Sierra Club filed its initial petition. We agree with the NRC Staff's comment that this contention is "solely related to the adequacy of the [aging management program] as it already existed in the application."[463] As explained *supra*, previously available information that is newly interpreted by the petitioner does not constitute good cause to file a new contention.[464]

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462. *See* NRC Staff Response to Sierra Club's Motion to Admit Contentions 27, 28, and 29 (Mar. 22, 2019) at 6-9 [hereinafter NRC Staff Answer to Sierra Club New Contentions]; Holtec Opposition to Late-Filed Sierra Club Contentions 27, 28, and 29 (Mar. 21, 2019) at 5-11 [hereinafter Holtec Opp. to Sierra Club New Contentions].

463. NRC Staff Response to Sierra Club New Contentions at 8.

464. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990)

Appendix E

Sierra Club Contention 27 is not admitted.

28. Sierra Club Contention 28

Sierra Club Contention 28 states:

During the hearing before the ASLB in this case that occurred on January 23 and 24, 2019, Holtec relied on its purported Aging Management Program, SAR Chapter 18, to support its claim that there is no issue with impacts to or from the groundwater, as set forth in Sierra Club Contentions 15-19. Holtec had not relied upon, or even mentioned, the Aging Management Program in its Answer to Contentions 15-19, which raise issues regarding the presence and location of and impacts from groundwater. This is new information that was not available to Sierra Club until Holtec relied upon the Aging Management Program at the ASLB hearing.

Holtec's Aging Management Program, SAR Chapter 18, only mentions groundwater testing or monitoring in connection with concrete structures, in Section 18.8. The Aging Management Program does not explain how the impact to the containers from groundwater or impacts to the groundwater from leaking containers will be addressed. The reference simply refers to Appendix D of NUREG-1927, which provides a process for experimental demonstration for time periods beyond a 20-year licensing

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(finding no "good cause" exists for late-filed safety concerns when petitioner "had yet to put the pieces of [the] safety puzzle together" despite previous availability of the information).

period.

The ER does not mention the aging management program at all.

Since the Holtec [consolidated interim storage] facility is expected to be in operation well beyond the 40-year licensing period, the Aging Management Program in the SAR, if it proposes to comply with accepted guidance, must set out in detail how it will do so.[465]

This proposed contention is the same as Contention 27, except "high burnup fuel" has been substituted with the term "groundwater." Sierra Club relies on the same documents as the basis for Contentions 27 and 28. Sierra Club also uses the same language to dispute Holtec's assertion at the oral argument that the aging management program is voluntary.

As with Contention 27, because this contention was submitted after the deadline, we first determine whether it meets the good cause standard of 10 C.F.R. § 2.309(c). We agree with the NRC Staff and Holtec that Sierra Club's Contention 28 fails to meet the first prong of section 2.309(c)(1),[466] and conclude that Sierra Club could have made this challenge in its initial petition. Again, Sierra Club does not assert that the information quoted from the oral argument or the documents underlying

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465. Sierra Club Additional Contentions at 8.

466. NRC Staff Answer to Sierra Club New Contentions at 7; Holtec Opp. to Sierra Club New Contentions at 17-20.

this contention are new or materially different than the information in Holtec's application, only that Sierra Club's interpretation is new. As explained *supra*, previously available information that is newly interpreted by the petitioner does not constitute good cause to file a new contention.[467]

Sierra Club Contention 28 is not admitted.

29. Sierra Club Contention 29

Sierra Club Contention 29 states:

> The [Environmental Report], Rev. 3, has now added "utilities," in addition to DOE, as possible entities that might take title to the radioactive waste in the [consolidated interim storage] facility. The [Environmental Report] provides no hint, however, as to whether a private utility that owns a nuclear reactor would agree to retain title to the waste. In fact, the costs to a private utility would be so great that the utility would not want to retain title to the waste. And Holtec is still presenting DOE as a possible titleholder in the [Environmental Report], even though Holtec's counsel admitted at the ASLB hearing on January 24, 2019, that DOE cannot legally take title to the waste. Thus, Holtec has failed to show reasonable assurance

467. *Turkey Point*, LBP-90-5, 31 NRC at 79.

of funding for the project, as required by 10 C.F.R. § 72.22(e).[468]

Sierra Club relies on a report by Robert Alvarez that "describes the financial implications to reactor owners" as support for the assertion that it "is highly unlikely—in fact, probably a fanciful dream—that private reactor owners would agree to incur that kind of expense"[469] to retain title to the nuclear waste. Sierra Club also cites the *Louisiana Energy Services* and *Private Fuel Storage* Commission decisions for a discussion of "what constitutes reasonable assurance of adequate funding."[470] In its motion to file Contention 29, Sierra Club claims that the information forming the basis for this challenge is materially different than information previously available because "Sierra Club had no reason to believe the option of the reactor owners' involvement was a serious proposal."[471]

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468. Sierra Club Additional Contentions at 14.

469. *Id.* at 15. Mr. Alvarez has significant experience in nuclear materials and policy development.

470. *Id.* at 17-18 (citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294 (1997) and *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-13, 52 NRC 23 (2000)).

471. Sierra Club's Motion to File New Late-Filed Contentions 27, 28, and 29 at unnumbered p. 3.

As with Contentions 27 and 28, because this contention was submitted after the initial deadline, we first determine if it meets the good cause standard of 10 C.F.R. § 2.309(c). We agree with the NRC Staff[472] and Holtec[473] that Sierra Club's Contention 29 fails to meet that standard, because Sierra Club could have made this challenge in its original petition. Sierra Club admits that Holtec's application always contained a private funding option, but it had not taken that option seriously.[474] We agree with the NRC Staff that "[w]hether or not Sierra Club believed the private funding option was 'a serious proposal', it was unquestionably . . . previously available."[475]

Sierra Club Contention 29 is not admitted.

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472. NRC Staff Answer to Sierra Club New Contentions at 11-13.

473. Holtec Opp. to Sierra Club New Contentions at 22-26.

474. *See* Sierra Club's Motion to File New Late-Filed Contentions 27, 28, and 29 at unnumbered pp. 1-2 ("As Sierra Club had said previously, Holtec's documentation appeared to present the option of the reactor owners' involvement as a fig leaf to hide the real intent for DOE to take title to the waste.").

475. NRC Staff Answer to Sierra Club New Contentions at 11 (quoting Sierra Club's Motion to File New Late-Filed Contentions 27, 28, and 29 at unnumbered p. 3).

C. Joint Petitioners

1. Joint Petitioners Contention 1[476]

Joint Petitioners Contention 1 states:

> The redaction of some 144 pages from Appendix C of the Holtec Environmental Report violates [NEPA] and National Historic Preservation Act.[477]

Joint Petitioners allege that "Holtec has violated § 106 of the [National Historic Preservation Act (NHPA)] by redacting extensive details about two historic or cultural properties referenced elsewhere in the Environmental

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476. Joint Petitioners also include an "objection" in their initial petition and move "for the dismissal and termination of this licensing proceeding." Joint Pet'rs Pet. at 24-25. They allege that "there is no federal authorization for the Holtec CISF" because "neither Part 72 nor the NWPA authorize" it, and the proposed facility does not fall under the NRC's definition of an independent spent fuel storage installation under 10 C.F.R. § 72.3. *Id.*

The Board overrules the objection. As explained in the Commission Secretary's Order denying Beyond Nuclear and Fasken's substantially similar motions to dismiss, the NRC's regulations do not provide for the filing of threshold motions or objections. *See* Order Denying Motions to Dismiss. Even if Joint Petitioners had made this argument in the form of a contention, we would not admit it for the same reasons we do not admit Beyond Nuclear's contention and Sierra Club Contention 1.

477. Joint Pet'rs Pet. at 26.

Report."[478] Joint Petitioners point to the Environmental Report's Appendix C, which describes the two historic or cultural properties in question but which has been wholly redacted. Joint Petitioners therefore allege that "[t]he redaction of 144 pages of Appendix C as being security-related has precluded Holtec's precise identification of the resources, and further has made public involvement in mitigation advocacy impossible."[479]

As the NRC Staff stated in its reply, it was the Staff—not Holtec—who redacted Appendix C in accordance with the NHPA.[480] Specifically, the NRC Staff made a preliminary conclusion that public disclosure of this information might risk harm to a potential historic resource.[481] Upon completion of the Staff's consultation with the Keeper of the National Register of Historic Places and a final determination of eligibility, the Staff will make available to the public any information that would not harm any potential historic properties.[482]

Moreover, if Joint Petitioners wanted access to the sensitive information in Appendix C, they had two opportunities to request it: once when the opportunity to

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478. *Id.*

479. *Id.* at 27.

480. NRC Staff Consol. Answer at 29 (citing 54 U.S.C. § 307103(a)).

481. *Id.* at 30.

482. *Id.*

request a hearing was published in the *Federal Register*,[483] and again when the Commission offered Joint Petitioners another 10-day opportunity to request access to such information.[484] Joint Petitioners did not take either opportunity to request access. In any event, because Joint Petitioners Contention 1 does not raise a dispute with Holtec's application, it is inadmissible.[485]

Joint Petitioners Contention 1 is not admitted.

2. Joint Petitioners Contention 2

Joint Petitioners Contention 2 has evolved. As initially proffered, it stated:

> Holtec cannot provide reasonable assurances that it can obtain the necessary funds to cover the costs of construction, operation, maintenance, and decommissioning of the CISF.[486]

Although not articulated in the contention itself, Joint Petitioners' original basis for Contention 2 explained that their challenge to Holtec's financial plan arose from their conviction that Holtec would not construct its proposed

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483. Notice of Opportunity to Request a Hearing, 83 Fed. Reg. at 32,919, 32,922-24.

484. *See* Order Denying Motions to Dismiss.

485. 10 C.F.R. § 2.309(f)(1)(vi).

486. Joint Pet'rs Pet. at 31.

storage facility "without financial guarantees from the U.S. Department of Energy."[487] However, Joint Petitioners contended, if Holtec contracted with DOE to store the nuclear power companies' spent fuel, it would violate the NWPA.[488] Thus, insofar as it relied on the assertion that Holtec's contracting with DOE would violate the NWPA, Joint Petitioners Contention 2 was substantially similar to Beyond Nuclear's sole contention and to Sierra Club Contention 1, discussed *supra*.

Indeed, after Holtec's counsel conceded that, with limited exceptions, it would violate the NWPA as currently in effect for DOE to take title to nuclear plant owners' spent fuel,[489] Joint Petitioners did just what Beyond Nuclear and the Sierra Club did. On the same day Beyond Nuclear moved to amend its contention and the Sierra Club moved to amend Sierra Club Contention 1, Joint Petitioners moved to amend the basis for their Contention 2 to add exactly the same statement:

> Language in Rev. 3 of Holtec's Environmental Report, which presents federal ownership as a possible alternative to private ownership of spent fuel, does not render Holtec's financial assurance plan lawful. As long as Holtec includes the federal government as a potential guarantor or financer of the project, which in

487. *Id.* at 32.

488. *Id.* at 32-33.

489. Tr. at 250-52.

> turn requires federal ownership of spent fuel, the application violates the NWPA.[490]

Insofar as Joint Petitioners Contention 2 now asserts that reference to the mere possibility of contracting with DOE must be expunged from Holtec's application, it remains substantially similar to both Beyond Nuclear's amended contention and Sierra Club's amended Contention 1. We therefore likewise grant Joint Petitioners' February 6, 2019 motion to amend their Contention 2, but rule that portion is not admissible for the same reasons that Beyond Nuclear's amended contention and Sierra Club's amended Contention 1 are not admissible.

But Joint Petitioners did not stop there. While leaving the text of their original Contention 2 unchanged, on February 25, 2019 Joint Petitioners moved to further amend the basis for the contention.[491] More than five months after timely filing their original petition, Joint Petitioners ask to replace their five-page basis statement for Contention 2 with a fifteen-page statement accompanied by a fourteen-page expert report.

Because Joint Petitioners seek to amend their contention after the deadline for filing petitions, we must

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490. Motion of [Joint Petitioners] to Amend Their Contention 2 Regarding Federal Ownership of Spent Fuel in the Holtec International Revised License Application (Feb. 6, 2019) at 8.

491. Motion of [Joint Petitioners] to Amend Their Contention 2 Regarding Holtec's Proposed Means of Financing the Proposed [CISF] (Feb. 25, 2019) [hereinafter Joint Pet'rs Feb. 25 Motion to Amend].

first consider whether its second motion satisfies the three-prong test in 10 C.F.R. § 2.309(c)(1)(i)-(iii). It does not.

Although Holtec and the NRC Staff argue to the contrary,[492] we agree that the new information on which Joint Petitioners *purport* to base their filing is materially different from information previously available, and that Joint Petitioners timely filed their motion within 30 days of when that information became available. However, Joint Petitioners' second motion to amend seeks to add material that is not in fact "based" upon that new information, as required by 10 C.F.R. § 2.309(c). Rather, their motion seeks to add arguments and supporting opinions that could have been submitted with their original petition.

Specifically, Joint Petitioners allege the new information triggering their second motion to amend the basis statement for Contention 2 is Holtec counsel's concession, during oral argument on January 24, 2019, that in nearly all instances DOE may not lawfully contract with Holtec to store nuclear power companies' spent fuel under the NWPA as currently in effect.[493] Joint Petitioners correctly assert that this was the first time Holtec unequivocally conceded that it cannot presently contract with DOE to store most spent nuclear fuel.[494]

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492. Holtec Opposition to [Joint Petitioners'] Motion to Amend Contention 2 (Mar. 22, 2019) at 4-12; NRC Staff Response to [Joint Petitioners'] Motion to Amend Contention 2 (Mar. 22, 2019) at 5-7.

493. Joint Pet'rs Feb. 25 Motion to Amend at 8.

494. *Id.*

Joint Petitioners' response to this development, however, was not to address Holtec's concession, but rather to seize the chance to try to further amend their basis statement for Contention 2 so as to visit or revisit a wide range of issues that were, or should have been, addressed in their original petition.

The centerpiece of Joint Petitioners' second motion to amend their basis statement for Contention 2 is the accompanying sworn declaration of Robert Alvarez, dated February 23, 2019, which is summarized and repeated in part in the basis statement itself.[495] Mr. Alvarez has significant experience in the areas of nuclear materials and policy development.[496]

Mr. Alvarez's declaration asserts that he reviewed Holtec's license application "in light of Holtec's admission that the only lawful way to finance the project was from the licensee owners of the waste using [Holtec's facility] for interim storage."[497] What follows in his declaration, however, is a statement that fails to analyze any specific provision in Holtec's application, and that contains 34 footnoted references all dating (apart from Holtec counsel's concession) from earlier than 2018. There is nothing new in Mr. Alvarez's declaration, and virtually nothing that purports to relate directly to Holtec counsel's January 24, 2019 concession.

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495. Joint Pet'rs Feb. 25 Motion to Amend, attach., Expert Report and Curriculum Vitae of Robert Alvarez (Feb. 23, 2019) [hereinafter Joint Pet'rs Alvarez Report].

496. *Id.*, Curriculum Vitae at 1, 4.

497. *Id.*, Alvarez Decl. at 1.

This is confirmed by Mr. Alvarez's own summary of his declaration, in which he sets forth six conclusions.

First, Mr. Alvarez states: "Holtec's license application relies heavily on illegal, nonexistent conditions and contract terms. Large amounts of spent fuel from commercial nuclear power fleet require very long term management and storage."[498]

This statement appears to be a throwback to Joint Petitioners' original Contention 2, which assumed that Holtec would rely on contracts with DOE that both Holtec and Joint Petitioners now agree would currently be unlawful. No one disputes that spent nuclear fuel requires long term management and storage. Mr. Alvarez's first conclusion presents no new information.

Second, Mr. Alvarez states:

> By assuming DOE would take title, the cost basis for the Holtec [facility] relies on DOE bearing costs. Since this option is not legal, the nuclear licensees must pay all costs. Management costs are more for the licensees when they must pay all costs of onsite storage, transport to and from a CISF and all [facility] operating and closure costs.[499]

Insofar as this statement challenges Holtec's financial plan as being unlawfully premised on contracts with

498. *Id.* at 14.

499. *Id.*

DOE, it ignores Holtec's October 9, 2018 Answer to Joint Petitioners' original Contention 2, in which Holtec clarified that it "is not relying on DOE contracts to demonstrate its financial qualifications."[500] Insofar as this statement is intended to suggest that Holtec's pricing structure will discourage power companies from contracting for spent fuel storage, it simply repeats Joint Petitioners' claim that private financing is "improbable," as set forth in Joint Petitioners' October 16, 2018 reply in support of their original Contention 2.[501] Either way, Mr. Alvarez's second conclusion presents no new information.

Third, Mr. Alvarez states: "These costs of continued licensee ownership at a [consolidated interim storage facility] have not been fully explored or revealed by Holtec and appear, based on existing information, to be significantly higher than management at the reactor sites."[502]

Insofar as this statement suggests that private financing is improbable because nuclear power plant owners might conclude they are financially better off by retaining their spent fuel, rather than by paying Holtec to store the fuel, it again repeats the same argument that Joint Petitioners raised more than four months earlier, in their reply in support of their original Contention 2.[503] Mr. Alvarez's third conclusion presents no new information.

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500. Holtec Answer to Joint Pet'rs at 31.

501. Joint Pet'rs Reply at 18.

502. Joint Pet'rs Alvarez Report, Alvarez Decl. at 14.

503. Joint Pet'rs Reply at 18.

Fourth, Mr. Alvarez states:

> High burnup fuel, an increasingly large portion of the wasted inventory, needs longer cooling in wet storage and its cladding could have less integrity than that of lower burnup fuel, thus the long term impacts of repeated transport must be considered before permitting routine massive shipments to a temporary location.[504]

The likelihood that high burnup fuel might present special concerns was the subject of several contentions that were proffered in Sierra Club's original petition[505]—contentions in which Joint Petitioners sought to join.[506] Mr. Alvarez's fourth conclusion presents no new information related to Holtec counsel's concession that Holtec may not lawfully contract with DOE to store most spent nuclear fuel under the NWPA, as currently in effect.

Fifth, Mr. Alvarez states: "High burnup fuel could need more protective storage such as double containerization to be moved and these costs have not been included."[507]

Again, as stated above, the considerations applicable to high burnup fuel have been previously addressed in this proceeding, and Joint Petitioners themselves have sought

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504. Joint Pet'rs Alvarez Report, Alvarez Decl. at 14.

505. *See* Sierra Club Pet. at 67-75.

506. Joint Pet'rs Pet. at 88.

507. Joint Pet'rs Alvarez Report, Alvarez Decl. at 14.

to join in contentions that address this issue. Mr. Alvarez's fifth conclusion presents no new information, and does not appear related to Holtec counsel's concession that Holtec may not lawfully contract with DOE to store most spent nuclear fuel under the NWPA, as currently in effect.

Sixth, Mr. Alvarez states: "Holtec does not include a dry transfer facility in its operations for at least the first century, but it will be needed well before that to repackage [spent nuclear fuel] for disposal and for the remediation of leaking, cracked or otherwise flawed and/or dangerous canisters."[508]

Likewise, the absence of a dry transfer facility has always been apparent from Holtec's license application. It was, in fact, addressed in Joint Petitioners Contentions 4 and 7, as submitted with their original petition on September 14, 2018.[509] Mr. Alvarez's sixth and final conclusion presents no new information, and does not appear connected to Holtec counsel's concession that Holtec may not lawfully contract with DOE to store most spent fuel under the NWPA as currently in effect.

Because the new information on which Joint Petitioners purport to rely (Holtec counsel's concession) is not, in fact, "[t]he information upon which the filing is based," they fail to satisfy 10 C.F.R § 2.309(c). We therefore deny Joint Petitioners' second motion to amend the basis statement for Joint Petitioners Contention 2.

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508. *Id.*

509. Joint Pet'rs Pet. at 46-49, 61-64.

Moreover, if we did allow Joint Petitioners to file their second amended basis for Contention 2, the contention still would not be admissible. As explained above, Mr. Alvarez's declaration is devoid of a single specific reference to Holtec's application and fails to raise a genuine dispute. Nor do the arguments advanced in Joint Petitioners' proffered amended basis itself warrant further proceedings.

For example, Joint Petitioners ignore the fact that Holtec's license application seeks approval of only the first of twenty potential phases. Joint Petitioners' claims about financial assurances for later phases or for storage beyond the licensed term are therefore outside the scope of this proceeding, and fail to satisfy 10 C.F.R. § 2.309(f)(1)(iii).

Nor do Joint Petitioners demonstrate how any information in Mr. Alvarez's declaration controverts Holtec's financial plan for the first phase or renders it deficient. General speculation about potential future costs, without specifying how they make incorrect the financial analysis for the only phase covered by the application, does not raise a genuine dispute with the application as required by 10 C.F.R. § 2.309(f)(1)(vi).

Insofar as Joint Petitioners contend that Holtec's application is deficient for failure to address liability coverage and the scope of Price-Anderson Act protection, they misapprehend the requirements of 10 C.F.R. § 72.22(e). That provision requires that an applicant either possesses, or demonstrates reasonable assurance of obtaining the necessary funds to cover (1) estimated

construction costs; (2) estimated operating costs; and (3) estimated decommissioning costs.[510] It says nothing about liability coverage. Regardless of whether the Price-Anderson Act will cover Holtec's activities, contrary to 10 C.F.R. § 2.309(f)(1)(iv) Joint Petitioners have not demonstrated why this issue is material to the NRC's review of Holtec's application or relates to their concern with its financial qualifications.

Likewise, although Joint Petitioners challenge as inadequate both Holtec's environmental cost-benefit analysis and its analysis of alternatives, they do not discuss or address, much less controvert, these sections of Holtec's Environmental Report. Thus, they fail to demonstrate a genuine material dispute with Holtec's license application, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Neither Mr. Alvarez's declaration nor Joint Petitioners' second amended basis for their Contention 2 therefore supports a contention that satisfies 10 C.F.R. § 2.309(f)(1).

Finally, insofar as Joint Petitioners Contention 2 continues to assert that Holtec intends to go forward with the project *only* if it is able to contract with DOE,[511] it is likewise not admissible for failure to raise a genuine dispute with the application. Holtec readily admits that it would prefer if Congress would change the law and

510. 10 C.F.R. § 72.22(e).

511. Joint Pet'rs Pet. at 34.

permit it to contract with DOE.[512] But both Holtec's license application and the statements of counsel at oral argument assure us that Holtec intends to proceed by attempting to negotiate storage contracts with the nuclear power plant owners themselves, at least unless and until another option is available.[513]

If Holtec is not successful, then the facility will not be built, as Holtec's license application makes clear it has no intention of beginning construction until it has sufficient contracts in hand.[514] No purpose would be served by convening an evidentiary hearing to further explore Holtec's intent, based either upon company documents that preceded its application or upon one sentence in a single more recent company publication that is arguably ambiguous.[515] None of these documents raises a genuine material dispute with Holtec's license application, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Joint Petitioners Contention 2, as amended, is not admitted.

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512. Tr. at 250.

513. Tr. at 248.

514. Holtec Proposed License at 2.

515. *See* Joint Pet'rs Feb. 25 Motion to Amend at 3; Motion by [Joint Petitioners] for Leave to File a New Contention (Jan. 17, 2019); [Joint Petitioners] Contention 14 (Jan. 17, 2019).

Appendix E

3. Joint Petitioners Contention 3

Joint Petitioners Contention 3 states:

> The Environmental Report contains a gross underestimation of the volume of low-level radioactive waste ("LLRW") that will be generated by the use of concrete and other materials for bunkering of the [spent nuclear fuel] canisters, and by replacement of the canisters themselves during the operational life of the CISF. Besides providing a distorted view of the waste management obligations the project will create, the financial burdens arising from creation, oversight and disposition of millions of additional tons of LLRW causes a seriously inaccurate picture of the true costs of constructing, operating and decommissioning the Holtec [facility].[516]

Taking issue with Holtec's estimate that it will only generate "small quantities of hazardous and non-hazardous waste . . . includ[ing] [LLRW],"[517] Joint Petitioners allege that "Holtec omits to mention that millions of tons of concrete will be mixed and poured onsite," which upon the facility's decommissioning "will have been transformed into a large quantity of radioactively activated waste."[518]

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516. Joint Pet'rs Pet. at 36-37.

517. *Id.* at 37 (citing ER at 3-108).

518. *Id.*

For support, Joint Petitioners rely upon "common sense" that the storage facility's concrete and subsoils will become activated, and upon the inferences that allegedly can be drawn from Holtec's narrow reply rebutting the *volume* of LLRW generated, not the generation of LLRW itself.[519] Joint Petitioners also challenge Holtec's reliance on the Continued Storage GEIS (and therefore section 51.23), as the Continued Storage GEIS "does not contemplate a storage facility that uses 8,000,000 tons of concrete" for housing spent fuel canisters[520] nor does it "account for the large, and escalating cost item of repackaging spent fuel to be moved from reactor sites to a consolidated storage facility, and thence ultimately to a geological repository," and thus Holtec may not rely upon it in its application.[521]

Holtec and the NRC Staff argue that Joint Petitioners have not met their burden in proffering facts or expert opinion supporting their allegations.[522] The Board agrees. Joint Petitioners only speculate that all "8,000,000 tons" of concrete used at the facility will become LLRW, despite conceding that the facility's concrete can be decontaminated by Holtec[523] and notwithstanding that the design of the proposed facility includes a "liner that serves to protect [the concrete] from contamination from

519. *See* Tr. at 161-62.

520. Joint Pet'rs Pet. at 40, 41.

521. *Id.* at 41.

522. *See* NRC Staff Consol. Answer at 34; Holtec Answer to Joint Pet'rs at 36.

523. *See* Tr. at 162.

its resident canister."[524] The Continued Storage GEIS concerning ISFSI decommissioning concludes:

> Although the exact amount of LLW and nonradioactive waste depends on the level of contamination, the quantity of waste generated from the replacement of the canisters, storage casks, concrete storage pads, DTS, and canister transfer building is still expected to be comparable to the LLW generated during reactor decommissioning, which was previously determined to have a SMALL impact in the Generic Environmental Impact Statement for License Renewal of Nuclear Plants (NRC 2013a).[525]

As to Joint Petitioners' complaint regarding the Continued Storage GEIS, including the alleged omission of the topics of repackaging of spent fuel and disposal of the spent fuel casks after repackaging, Holtec's Environmental Report appropriately relies on the Continued Storage GEIS. We therefore agree with Holtec that Joint Petitioners' complaint amounts to an impermissible attack on the NRC's regulations.[526]

Joint Petitioners Contention 3 is not admitted.

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524. Holtec Answer to Joint Pet'rs at 43 (citing Decommissioning Plan at 9).

525. Continued Storage GEIS at 5-48.

526. *See* 10 C.F.R. § 2.335.

Appendix E

4. Joint Petitioners Contention 4

Joint Petitioners Contention 4 states:

> Holtec has defined a site-specific spent nuclear storage facility that does not qualify for the exclusions from NEPA scrutiny conferred by the Waste Storage GEIS. Consequently, severe accident mitigation during transportation to and from the Holtec CISF and at the CISF, and SNF and GTCC storage and management operations at the CISF site, may not be treated as generic issues and excused from consideration within the EIS.[527]

On February 18, 2019, Joint Petitioners moved to amend Contention 4 based on allegedly new information revealed in Holtec's January 17, 2019 responses to the NRC Staff's requests for additional information (RAIs).[528] The amended contention would add the following paragraph:

> Holtec has created an issue of fact by claiming that its over-optimistic conclusion that there are no credible challenges to canister confinement integrity capable of causing radioactivity release is consistent with the GEIS.[529]

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527. Joint Pet'rs Pet. at 46.

528. Joint Pet'rs Motion to Amend Contentions 4 & 7, at 6-7.

529. *See* Joint Petitioners' Amended Contentions 4 & 7 (Feb. 18, 2019) [hereinafter Joint Pet'rs Amended Contentions 4 & 7]. The NRC Staff and Holtec timely filed responses in opposition to

In their motion, Joint Petitioners rely on Dr. Gordon Thompson's declaration to try to show that Holtec's RAI 9-3 response about accident conditions is ""seriously inconsistent" with the GEIS.[530] Joint Petitioners also claim that Holtec's "insistence that there is zero potential accident or attack scenario that would result in a release of hazardous radioactivity lacks credibility and undermines . . . Holtec's decisions to not have an on-site emergency response plan for radiological accidents and its determination not to have [dry transfer system (DTS)] capability."[531]

As explained *supra*, the Board will consider an amended contention filed after the original deadline only if petitioner demonstrates good cause under the three-pronged test of 10 C.F.R. § 2.309(c)(1). Here, we agree with the NRC Staff and Holtec that Joint Petitioners have failed to demonstrate good cause, because the information upon which they base their amended contention was previously available. The difference between Holtec's original SAR section 9.2.2 and its answer in RAI 9-3 is three words. Holtec changed "there is no credible normal or accident situation" to "there is no credible normal, *off-normal*, or accident *conditions*." This revision is consistent with

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the Joint Petitioners' motion. *See* NRC Staff 's Response to [Joint Petitioners] Motion to Amend Contentions 4 and 7 (Mar. 14, 2019) [hereinafter NRC Staff 's Response to Joint Pet'rs Motion to Amend Contentions 4 & 7]; Holtec Opposition to [Joint Petitioners'] Motion to Amend Contentions 4 and 7 (Mar. 15, 2019).

530. Joint Pet'rs Amended Contentions 4 & 7, at 6-7.

531. *Id.* at 7.

the same conclusions made by Holtec in SAR 9.2.1. Joint Petitioners do not show how those three words in RAI 9-3 change Holtec's answer in a way that provides new or materially different information. In fact, Dr. Thompson's declaration acknowledges that Holtec's RAI response is an "equivalent assertion" to one made in its Environmental Report in section 4.13.2.[532] Because Joint Petitioners have failed to meet the first prong under 10 C.F.R. § 2.309(c)(1), we deny their motion to amend Contention 4.

Accordingly, we analyze Joint Petitioners Contention 4 as originally filed. In their original filing, Joint Petitioners cite four bases for their contention: (1) the proposed facility is not legally authorized; (2) the proposed facility departs from assumptions in the GEIS; (3) Holtec agrees that its project is site-specific; and (4) the proposed facility is not covered by the GEIS exemption.[533]

We have previously rejected the first basis in addressing Beyond Nuclear's contention and Sierra Club's Contention 1, *supra*. As to the remaining bases, we agree with Holtec[534] and the NRC Staff[535] that Joint Petitioners' challenges to the lack of dry transfer system capability at the proposed facility and to Holtec's "return to sender" policy do not demonstrate a genuine dispute with the application on a material issue of law or fact.

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532. Joint Pet'rs Amended Contentions 4 & 7, at 7.

533. Joint Pet'rs Pet. at 46-49.

534. *See* Holtec Answer to Joint Pet'rs at 44-46.

535. *See* NRC Staff Consol. Answer at 36-37.

The Continued Storage GEIS acknowledges that not all storage facilities will necessarily match the "assumed generic facility," and therefore when it comes to "size, operational characteristics, and location of the facility, the NRC will evaluate the site-specific impacts of the construction and operation of any proposed facility as part of that facility's licensing process."[536] The site-specific evaluation would not "reanalyze the impacts of continued storage," because that is already covered by the GEIS and requires a waiver to challenge.[537] Accordingly, Holtec's Environmental Report contains a site-specific impact analysis for the period of the proposed activity. Neither the Continued Storage GEIS nor NRC regulations require an analysis of a dry transfer system at this time; rather, because Holtec does not intend to build a dry transfer system during the initial license term, the analysis will not be required until Holtec pursues a dry transfer system as a separate action.[538]

Joint Petitioners Contention 4 is not admitted.

5. Joint Petitioners Contention 5

Joint Petitioners Contention 5 states:

> Horizontal hydraulic fracturing ("fracking") is certain to occur underneath the Holtec site.

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536. Continued Storage GEIS at 5-2.

537. *Id.*

538. *Id.*

> Holtec has acquired mineral rights to a depth of 5,000 feet to part of its site from Intrepid, a potash mining firm. However, within the boundaries of the Holtec site there are mineral leases held by at least half a dozen oil and gas drilling firms and Mosaic Potash, a mining firm. There is no indication in the Environmental Report of any control over present or potential potash mining or oil and gas drilling. And the very area where the concrete bunkers containing [spent nuclear fuel] casks will be located, fracking activity can be carried on below 5,000 feet. Typical oil and gas wells in the Permian Basin region in which Holtec is located are 8,000 or more feet deep. The mineral interests are inadequately disclosed, and the realistic prospects for mineral development immediately surrounding and underneath the Holtec site, and their implications for inducing or expediting geological problems and groundwater movement beneath the site, are inadequately disclosed in the ER.[539]

Joint Petitioners Contention 5 concerns potential mining and fracking at and underneath the site. Joint Petitioners first claim that "fracking is certain to occur"[540] at the Holtec site, and further claim that the Environmental Report reveals that Holtec does not in fact control any of the mineral rights at the proposed

539. Joint Pet'rs Pet. at 49.

540. *Id.*

storage facility's boundary except those belonging to Intrepid Potash—New Mexico, LLC (Intrepid).[541] They contend that there are twelve abandoned hydrocarbon wells, "many on that part of the site where the concrete bunkers are to be built," and assert that, in light of the "long history of underground potash mining" at the site, the Environmental Report "does not faithfully report the true story of land ownership and mineral rights interests" at the site.[542] Second, Joint Petitioners allege that the Environmental Report "fails to connect the considerable history of oil and gas brine disposal at the Holtec site" which in turn causes a "possible relationship to poor quality and corrosive groundwater," soil, and "wind-blown dust."[543] Joint Petitioners allege that these phenomena could thus corrode the "steel or alloy canisters nosed into concrete bunkers down to about 23 feet of depth, for a century or more," as well as the concrete UMAX canister system itself.[544] Third, Joint Petitioners assert that Holtec failed to comply with 10 C.F.R. § 72.103(f), alleging that Holtec did not investigate the "geological and seismic implications of mining and fracking . . . *inside* the site boundaries."[545] Finally, Joint Petitioners posit that the Environmental Report fails to satisfy 10 C.F.R. § 72.90 and 10 C.F.R. § 72.94, because it is missing analyses of "site characteristics that may directly affect the safety or

541. *Id.* at 50.

542. *Id.* at 51-52.

543. *Id.* at 52.

544. *Id.*

545. *Id.* at 54.

environmental impact of the ISFSI" and "past and present man-made facilities and activities that might endanger the proposed ISFSI."[546]

Regarding fracking and potash mining, Joint Petitioners' proffered exhibit, an ELEA Mineral Conflict Analysis map from 2015, does not set forth a genuine dispute with the Holtec application on a material issue of fact. According to Holtec's Environmental Report, its proposed facility would be built on grid 13 of coordinate 020S, 032E, the western half of grid 18 and the southwestern corner of grid 17.[547] Comparing these coordinates to Joint Petitioners' proffered 2015 Map, it is clear that (1) although COG Operating LLC appears to own mineral rights at grid 13, the proposed facility's footprint does not show any active or abandoned gas or oil zones inside the footprint of the facility; and (2) only Intrepid's rights exist at the site pursuant to its New Mexico potash mining lease.[548] Moreover, the Environmental Report states that Holtec controls the mineral rights at the site down to 5,000 feet pursuant to an agreement with Intrepid, and Intrepid will not mine at the site.[549] Additionally "any future oil drilling or fracking beneath the site would occur at greater than 5,000 feet depth," which would ensure that no subsidence

546. *Id.* at 54-55.

547. ER at 3-5 to -6.

548. 2015 Map at 3-4.

549. ER at 3-2.

would occur at the site.[550] The discussion of land use and maps in Chapter 3 of Holtec's Environmental Report reports the status of mineral rights and land ownership at the proposed HI-STORE site.

Regarding possible brine, contaminated groundwater, soil, and wind-blown dust that could potentially degrade the HI-STORE vault and spent fuel storage canisters stored therein, we agree with the NRC Staff that this aspect of the contention concerns safety,[551] yet Joint Petitioners do not cite to or even mention the SAR. Holtec did address issues regarding soil chemistry analysis and groundwater flow at the site both in its Environmental Report and SAR.[552] Joint Petitioners do not proffer any explanation of how this alleged caustic brine, groundwater, or soil could enter into the HI-STORE UMAX system and corrode the canisters. Nor do they proffer facts or expert opinion discussing how the alleged wind-blown caustic dust could get to the UMAX and degrade the UMAX concrete. Therefore, this aspect of the contention is inadmissible for failing to raise a genuine dispute with Holtec's license application.[553]

Finally, as to the alleged lack of discussion of seismology inside the site boundary pursuant to section

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550. *Id.*

551. NRC Staff Consol. Answer at 43-44.

552. *See* ER at 3-15 (soil); *id.* at 3-39 to -41, 3-54 (Fig. 3.5.1), 3-56 (Fig. 3.5.3) (groundwater); SAR at 2-3 to -9, 2-26 (soil); *id.* at 1-5, 1-14; 2-78 to -79, 2-81, 2-90, 2-96 to -99 (groundwater).

553. 10 C.F.R. § 2.309(f)(1)(v), (vi).

73.103(f), the Environmental Report and the SAR do discuss geological and seismic issues as they relate to mining and fracking inside the site boundary.[554] As discussed *supra* in connection with Sierra Club Contention 14, no faults of any kind were found at the proposed site (i.e., inside the site boundary[555]). Joint Petitioners' other allegations are impermissibly vague.[556]

Joint Petitioners Contention 5 is not admitted.

6. Joint Petitioners Contention 6

Joint Petitioners Contention 6 states:

> The Holtec [facility] is a major component of a large plan to aggregate [spent nuclear fuel] in southeastern New Mexico for purposes of reprocessing. A radioactively 'dirty' industrial activity, reprocessing has been omitted from analysis and disclosure of cumulative environmental impacts.[557]

Joint Petitioners rely on "a 2015 slide show given by a Holtec representative to the New Mexico State

554. *See* ER at 3-17 to -18; SAR at 2-107 to -108.

555. *See* ER at 3-13 to -14.

556. *See Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), LBP-16-5, 83 NRC 259, 281 (2016) (citing *Palisades*, LBP-06-10, 63 NRC at 341, *aff'd*, CLI-06-17, 63 NRC 727 (2006)).

557. Joint Pet'rs Pet. at 55.

Legislature" that stated that the proposed facility may provide "flexibility for recycling, research, and disposal" and also listed ""reprocessing [spent nuclear fuel]" as an option under "waste solutions."[558] Joint Petitioners also cite a 2017 *Los Angeles Times* article that quoted a voting member of the Eddy-Lea Energy Alliance as saying, "We believe if we have an interim storage site, we will be the center for future nuclear fuel reprocessing."[559] Joint Petitioners claim that NEPA requires a cumulative impacts analysis of reprocessing spent nuclear fuel at the proposed facility, because such an action "falls within the realm of 'cumulative actions' delineated in the [Council on Environmental Quality (CEQ)] regulations."[560]

Joint Petitioners fail to raise a genuine dispute with the application on an issue of material fact or law, because the application does not seek authorization for, or even mention, reprocessing at the proposed facility. Neither NEPA nor NRC regulations require an environmental analysis of potential actions that are "merely contemplated" and have not been proposed.[561] We agree with the NRC Staff that

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558. *Id.*

559. *Id.* at 55-56.

560. *Id.* at 59. The CEQ regulations do not bind the NRC as an agency, but the Commission has chosen to follow them in some instances. *See Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 443-44 (2011).

561. *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295 (2002). *See also Kleppe v. Sierra Club*, 427 U.S. 390,

the cited sources, at most, "suggest a political appetite for such a project in the area," without creating any proposed plans for reprocessing spent fuel.[562]

Because reprocessing is not material to Holtec's license application, Joint Petitioners' claims about the safety of reprocessing are not relevant. In addition, their claims are unsupported by any facts or expert opinion, and do not raise a genuine issue with the application for that reason as well.

Joint Petitioners Contention 6 is not admitted.

7. Joint Petitioners Contention 7

Joint Petitioners original Contention 7 states:

> Holtec's "HI-STORE philosophy" of "Start Clean/Stay Clean," whereby incoming shipments of canisters that are contaminated, leaking, or otherwise compromised will be returned to the originating power plant for dispositioning, is illegal under NRC regulations and the Atomic Energy Act. It is unlawful to knowingly ship containers with radiation on exposed or external surfaces. Once delivered

410 (1976); *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-16-13, 83 NRC 566, 577 (2016), *petition for review denied sub nom., Nat. Res. Def. Council v. NRC*, 879 F.3d 1202 (D.C. Cir. 2018).

562. NRC Staff Consol. Answer at 47.

> to the site, leaky and/or contaminated canisters must remain at Holtec—but Holtec expressly intends to return such canisters to their points of origin. Leaking or otherwise compromised shipping containers would likewise present an immediate danger to the corridor communities through which they would travel back to their nuclear power plant site of origin, likely violating numerous additional NRC and DOT regulations[.[563]

On February 18, 2019, Joint Petitioners moved to amend Contention 7, seeking to add the following paragraph:

> Holtec's refusal to publicize emergency and contingency plans, as well as its insistence that there is zero potential accident or attack scenario that would result in a radiation release (and hence no need for dry transfer storage capability) reflects a lack of a national policy for handling and disposal of [spent nuclear fuel] and Holtec's misperception as to the role of a CISF in national policy. The applicant's non-credible positions on these matters takes them outside the coverage and shield of the Continued Storage GEIS and requires them to be scrutinized under NEPA and addressed in the Environmental Impact Statement.[564]

563. Joint Pet'rs Pet. at 61.

564. Joint Pet'rs Amended Contentions 4 & 7, at 6.

Joint Petitioners base the motion on (1) Holtec's RAI Response 9-3 and (2) Holtec's RAI Response LA-1, both dated January 16, 2019 and released in the NRC's Agencywide Documents Access and Management System (ADAMS) on January 17, 2019. Joint Petitioners specifically cite the portion of RAI Response 9-3 that references SAR 9.2.2, "Operational Activities," addressing the NRC Staff's request for clarification about off-normal conditions "in addition to the normal, off-normal and accident conditions while on-site prior to, or during receipt inspection."[565] Joint Petitioners also cite RAI Response LA-1, which addressed the NRC Staff's questions regarding "the absence of a time limit for a canister to be returned to the nuclear plant of origin or other facility licensed to perform fuel loading procedures" in the HI-STORE storage facility's Technical Specifications.[566]

We first consider whether Joint Petitioners' motion to amend Contention 7 meets the three-pronged standard for good cause under 10 C.F.R. § 2.309(c). It does not. RAI Response 9-3 did not reveal any materially new information.[567] Joint Petitioners previously had the chance to challenge the statement in Holtec's SAR section 9.2.2 that identified "no credible events . . . that would result in a release of any radioactive materials into the work

565. RAI Response 9-3 at 4.

566. RAI Response LA-1 at 1.

567. *See* discussion of RAI Response 9-3 under Joint Petitioners Contention 4, *supra.*

areas or the environment."[568] And essentially they did just that in Contention 7, as originally filed. In the absence of new information, Joint Petitioners are not entitled to a second chance to support a claim that was identified in their original pleadings by proffering the statement of Dr. Gordon Thompson at this late date.

As to RAI Response LA-1, the Board also concludes that it presents no materially different new information under 10 C.F.R. § 2.309(c)(1). The NRC Staff merely sought details concerning the time limit during which a canister would be returned to the site of origin or licensed fuel loading site, and Holtec responded by amending its SAR at section 10.3.3.1 and section 5.5.5.b.3 to its proposed materials license.[569] Although these sections now detail that the amount of time Holtec would have to return a leaky canister to its point of origin or fuel loading facility is based on the NRC's maximum annual dose rate limits, Joint Petitioners' overarching "start clean/stay clean" challenge is the same as in their original petition.[570] And Holtec's procedure is in accord with Joint Petitioners' originally-disputed portion of the SAR (rev. 0A), section 3.1.4.6.[571] This new information is therefore not materially different.

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568. SAR at 9-7.

569. *See* SAR at 10-12 to -14; Revised App. A to Materials License No. SNM-1051, Tech. Specs. for the HI-STORE [CISF] at 5-6 (Nov. 30, 2018) (ADAMS Accession No. ML18345A138).

570. *See* Joint Pet'rs Pet. at 61.

571. *Id.* at 62.

Joint Petitioners' witness, Dr. Thompson, opines that the potential use of a "sequestration canister with a gasketed lid," without an articulated plan for its use, "suggests that Holtec is not serious about contingency planning."[572] RAI Response LA-1 does not create a basis for the sequestration canister aspect of the proposed amended Contention 7, as that information was readily available before the deadline for petitions in this proceeding.[573] Finally, even if we were to find that the information in RAI Response LA-1 is new and material, Joint Petitioners do not provide a sufficient nexus to the amended Contention 7. RAI Response LA-1 simply does not support Joint Petitioners' new challenges concerning Holtec's alleged "refusal to publicize emergency and contingency plans," the "lack of a national policy for handling and disposal of [spent nuclear fuel]," and Holtec's "misperception as to the role of a CISF in national policy."[574]

We deny the motion to amend Contention 7, and therefore analyze Contention 7 as originally pled. Joint Petitioners assert that Holtec's "policy of rejecting and returning canisters that have unacceptable

572. Joint Pet'rs Motion to Amend 4 & 7, at 8.

573. *See* SAR rev. 0C at 604 (May 31, 2018).

574. Joint Pet'rs Amended Contentions 4 & 7, at 6. Even if we accepted that this alleged new information supported these assertions, Holtec's Emergency Plans were available at the commencement of the proceeding, SAR at 6-45, 10-29, 15-10, 15-11, 15-16, and challenges to the national spent fuel management policy go well beyond the permissible scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

external radioactive or structural damage[] . . . will create potential exposure routes that pose radioactive contamination threats to the public, nuclear workers, and the environment.[575] Joint Petitioners also take issue with the lack of a dry transfer system at the proposed storage facility, claiming that such a transfer system could potentially ameliorate their concerns regarding casks that arrive damaged to the facility.[576]

Joint Petitioners Contention 7 is inadmissible because it fails to cite facts or expert opinions that support Joint Petitioners' position on the issue of the "start clean/stay clean" philosophy. Although Joint Petitioners claim that a canister could arrive to the facility damaged and emitting "significant radioactive materials" that could "migrate off-site,"[577] they offer no facts or expert opinion supporting that position. Specifically, Joint Petitioners fail to submit facts or expert opinion that show (1) how the spent fuel, when packaged at the reactor site, would leave the site leaking or damaged notwithstanding NRC-approved quality assurance programs; (2) how the spent fuel canister, within its transport overpack cask, would become credibly damaged in an accident scenario that results in an exceedance of dose rates while in transit; and (3) how the sequestration sleeve, as outlined in Holtec's SAR at the time petitions were due in this proceeding, is an inadequate remedy should the cask and canister somehow become damaged.

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575. Joint Pet'rs Pet. at 61-62.

576. *Id.* at 64.

577. *Id.* at 62.

Indeed, the Commission has already spoken to this issue in a similar proposed facility proceeding, *Private Fuel Storage*.[578] In that proceeding, the State of Utah proffered a contention where a canister "improperly constructed or improperly sealed, could be loaded and shipped" to the spent fuel storage facility, which in turn could harm the environment.[579] Similar to Holtec's proposed policy, storage facility operator Private Fuel Storage's (PFS) policy was to ship back a leaking or defective canister to its point of origin, and Utah alleged that this practice was unsafe (as Joint Petitioners do here).[580]

As the NRC had already generically determined that an accidental canister breach was not a credible scenario, the Commission held that Utah had failed to advance a credible, unconsidered accident scenario concerning a canister breach while in transport.[581] And as for PFS's "return to sender" policy regarding damaged fuel canisters, which is the same as Holtec's, the Commission held that Utah had failed to contest the NRC-approved quality assurance programs in the packaging and transportation of spent nuclear fuel[582]—those very programs that provide that a transportation accident or

578. *Private Fuel Storage*, CLI-04-22, 60 NRC at 136-37.

579. *Id.* at 136, 137.

580. *Id.* at 138.

581. *Id.* at 137.

582. *Id.* at 138.

breach of canister is not credible. As *Private Fuel Storage* is analogous to this proceeding, we reject Contention 7 for the same reasons the Commission rejected Utah's contention.

Joint Petitioners Contention 7 is not admitted.

8. Joint Petitioners Contention 8

Joint Petitioners Contention 8 states:

> In several places in the [Environmental Report], Holtec states that "Table 4.9.1" provides data tending to show minimal radiation dangers from transporting the casks of spent nuclear fuel [(SNF)]. The data is not narratively reproduced in the ER. The missing table undermines Holtec's basis for claiming minimal effects from transporting SNF and GTCC waste.[583]

Because Joint Petitioners withdrew Contention 8,[584] it is not admitted.

9. Joint Petitioners Contention 9

Joint Petitioners Contention 9 states:

> There is only one map published in the Environmental Report that shows any of the

583. Joint Pet'rs Pet. at 64.

584. Joint Pet'rs Reply at 50.

> routes which will be taken for delivery of [spent nuclear fuel (SNF)] and [greater than class C (GTCC)] waste to Holtec, and it only mentions transport of radioactive material from two reactors. The information provided comes nowhere near disclosure of a 20-year transport campaign of an estimated 10,000 cask deliveries.[585]

Joint Petitioners ask for "unconditional disclosure of probabl[e] transportation routes, whether by barge, highway or rail" so that they can "meaningfully participate in the NEPA process" and "public and emergency response officials [can] begin to understand the scope of the Holtec project's transportation side."[586] They also claim that the "transportation aspects of Holtec are of high significance to completion of the project" and that NRC regulations require discussion of "[a]dverse environmental effects which cannot be avoided," of alternatives, and of "any irreversible and irretrievable commitments of resources which would be involved in the proposed action," as well as an "investigation of environmental effects of the act of transporting the [spent nuclear fuel]-filled canisters."[587]

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585. Joint Pet'rs Pet. at 66.

586. *Id.* at 67.

587. *Id.* at 67-68 (citing 10 C.F.R. §§ 51.45(b)(1)-(3),(5), 72.108).

We agree with the NRC Staff[588] and Holtec[589] that Joint Petitioners fail to demonstrate how NEPA or NRC regulations require a specific assessment of possible transportation routes. None of the legal authority cited by Joint Petitioners (10 C.F.R. §§ 51.45, 72.108, and NEPA) specifies that a certain number of transportation routes must be analyzed in an applicant's Environmental Report, let alone every conceivable transportation route. Holtec's Environmental Report already evaluates three "representative routes" to determine likely radiological impacts of transportation—one from San Onofre to the proposed facility, one from Maine Yankee to the proposed facility, and one from the proposed facility to Yucca Mountain.[590] The use of representative routes is in keeping with past NRC practice to evaluate transportation impacts.[591] Joint Petitioners have failed to raise a genuine dispute with Holtec's application.

Regarding Joint Petitioners' statement that "public and emergency response officials" need "unconditional

588. *See* NRC Staff Consol. Answer at 51-53.

589. *See* Holtec Answer to Joint Pet'rs at 70-71.

590. ER at § 4.9.

591. *See*, *e.g.*, Continued Storage GEIS at 5-49 to -54; Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, NUREG-1714 at 5-39 (Dec. 2001). *See also* 10 C.F.R. § 51.52, tbl. S-4 (deriving generic effects of transportation and fuel waste for one power reactor based on survey of then-existing power plants).

disclosure of probabl[e] transportation routes," we agree with Holtec[592] that this concern is outside the scope of this proceeding. Spent nuclear fuel transportation route identification requires separate review and approval by the NRC and the Department of Transportation, as well as by applicable States or Tribes.[593] For that separate review process, Holtec will also need to coordinate with local law enforcement and emergency responders. Such coordination is not relevant at this point in the licensing process.

Joint Petitioners Contention 9 is not admitted.

10. Joint Petitioners Contention 10

Joint Petitioners Contention 10 states:

> Holtec plans to provide long-term [spent nuclear fuel (SNF)] storage for up to 120 years, or for however much time beyond 120 years it may take to develop a deep geological repository elsewhere. Holtec itself has recommended to the U.S. Department of Energy that a [CISF] should have a minimum service life of 300 years.[594]

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592. Holtec Answer to Joint Pet'rs at 68.

593. *See* 10 C.F.R. Parts 71 and 73; 49 C.F.R. Parts 107, 171-180, 390-397.

594. Joint Pet'rs Pet. at 68 (internal quotations omitted).

Joint Petitioners claim that "[e]xtended operation of the Holtec CISF beyond the 100-year benchmark is a cumulative action and must be analyzed as such under NEPA."[595]

The proposed action in this proceeding is a 40-year initial license.[596] Holtec may anticipate following the initial license with two 40-year license renewals, under 10 C.F.R. § 72.42, but that is not relevant to this proceeding, as those renewals would trigger new hearing opportunities. The Continued Storage Rule explicitly provides that an applicant's Environmental Report is not required to discuss impacts following the proposed license term.[597] Therefore, we agree with the NRC Staff[598] and Holtec[599] that Joint Petitioners impermissibly challenge the Continued Storage Rule and the impact evaluations contained in the Continued Storage GEIS. Joint Petitioners have not requested a waiver, and this contention is therefore outside the scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii).

Joint Petitioners Contention 10 is not admitted.

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595. *Id.* at 69.

596. Notice of Opportunity to Request a Hearing, 83 Fed. Reg. at 32,919 ("If the NRC approves the application and issues a license to Holtec, Holtec intends to store . . . commercial spent nuclear fuel . . . for a 40-year license term.").

597. 10 C.F.R. § 51.23(b).

598. NRC Staff Consol. Answer at 54.

599. Holtec Answer to Joint Pet'rs at 72.

Appendix E

11. Joint Petitioners Contention 11

Joint Petitioners Contention 11 states:

> NEPA Requires Significant Security Risk Analyses for the Massive Spent Nuclear Fuel and Greater-Than-Class-C Wastes Proposed for Interim Storage And Associated Transportation Component at Holtec's New Mexico Facility.[600]

Joint Petitioners claim that this Board should require in Holtec's Environmental Report an analysis of terrorist attacks as a "not so remote and highly speculative" environmental impact, consistent with the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*.[601] Joint Petitioners then direct the Board to a 69-page report by Dr. James D. Ballard concerning human-initiated events, transportation, and storage of highly radioactive materials at the proposed UMAX interim storage facility.[602] Based on the Ballard Report, Joint Petitioners

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600. Joint Pet'rs Pet. at 70.

601. Joint Pet'rs Pet. at 77 (quoting *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1032 (9th Cir. 2006)).

602. James David Ballard, *Holtec HI-STORM UMAX Interim Storage Facility (a.k.a. CISF): Human Initiated Events (HIE), Transportation of the Inventory and Storage of Highly Radioactive Waste Materials* (Sept. 2018) [hereinafter Ballard Report]. Dr. Ballard has a Ph.D. in sociology and is a professor of criminology and justice studies at California State University, Northridge.

put forward twenty-eight "detailed sub-contentions"[603] ranging from recommending Holtec create a "site specific and programmatic EIS process" because of its "vertical monopoly" in the energy industry;[604] to wanting the NRC and/or Holtec to "define [Design Basis Events] and [Design Basis Threats] for the whole duration of the transportation campaign;[605] to recommending the NRC define through regulations the specific penalties to be imposed upon Holtec for "lack of vigilance" in any aspect of the transportation and the management of the spent fuel;[606] to suggesting the NRC incorporate consent-based siting, waste transport, and storage based on the Blue Ribbon Commission and National Academy of Sciences report recommendations.[607]

In *San Luis Obispo Mothers for Peace*, the United States Court of Appeals for the Ninth Circuit held "that it was unreasonable for the NRC to categorically dismiss the possibility of terrorist attack on the Storage Installation . . . as too remote and highly speculative to warrant consideration under NEPA."[608] And although Joint Petitioners acknowledge that New Mexico is not part

603. Joint Pet'rs Pet at 79.

604. *Id.* at 79-80.

605. *Id.* at 80.

606. *Id.* at 84.

607. *Id.* at 85.

608. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1030 (internal quotations omitted).

of the Ninth Circuit,[609] they claim that because "hundreds of shipments will come through the Ninth Circuit en route to New Mexico . . . the Ninth Circuit law must be respected and abided by within the geographic territory of the Ninth Circuit," and thus Holtec must conduct a terrorism analysis in its Environmental Report under the Ninth Circuit standard in accordance with NEPA.[610]

The NRC takes the position (as confirmed by the United States Court of Appeals for the Third Circuit[611]) that for all licensing actions outside the Ninth Circuit, "terrorist attacks are too far removed from the natural or expected consequences of agency action to require environmental analysis."[612] Unless the proposed facility would be located in one of the nine states in the Ninth Circuit, no terrorist analysis under NEPA is required. Holtec's facility would be constructed in New Mexico (located in the Tenth Circuit). Holtec's Environmental Report need not conduct an analysis concerning terrorism under NEPA. This aspect of Contention 12 is therefore inadmissible as outside the scope of this proceeding.[613]

As to the remaining recommendations and observations in the Ballard Report, we agree with the NRC Staff's

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609. Joint Pet'rs Reply at 61.

610. Tr. at 174.

611. *N.J. Dep't of Envtl. Prot. v. NRC*, 561 F.3d 132 (3d Cir. 2009).

612. Continued Storage GEIS at 4-91.

613. 10 C.F.R. § 2.309(f)(1)(iii).

assessment[614] that all of the twenty-eight proffered subcontentions fall short of the Commission's contention admissibility standards. Namely, they all fail to show a genuine dispute with the interim storage facility application, much less even address or acknowledge the application in the petition.[615] An admissible contention must, at a minimum, reference the portion of the application to which the contention is challenging "and show where the applicant is lacking"—here, none of the subcontentions does this.[616] Board proceedings regarding an application for an NRC-issued license are not a proper forum for contentions that comprise broad policy recommendations and challenges to the Agency's rules.[617]

Joint Petitioners Contention 11 is not admitted.

12. Joint Petitioners Contention 12

Joint Petitioners Contention 12 states:

> Because of the geologic formations and conditions beneath the Holtec site, there

614. *See* NRC Staff Consol. Answer at 57-59.

615. The NRC Staff notes, and we agree, that only in one place does the Ballard Report cite sections of the application. *See* Ballard Report at 54-55 n.11. The report does not grapple with the application as required by the Commission's contention admissibility standards.

616. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 156 (1991).

617. 10 C.F.R. § 2.335.

> are risks inherent in siting and operating the [consolidated interim storage] facility as proposed by Holtec. The [Environmental Report] and SAR in this case do not adequately discuss and evaluate the risks created by those geologic conditions.[618]

Joint Petitioners cite two regulations, 10 C.F.R. § 51.45 (requirement for an environmental report) and 10 C.F.R. § 72.90 (site characteristics related to safety),[619] but mainly rely on a thirty-page report by a geologist, Dr. Steven Schafersman.[620] Joint Petitioners allege that Dr. Schafersman has "extensive experience and knowledge regarding Permian Basin geology."[621] The Schafersman Report is divided into two parts: Part I, which presents "three geologic reasons that demonstrate why it is inadvisable to temporarily or permanently store [spent nuclear fuel/high level nuclear waste]" at the proposed Holtec site; and Part II, which presents "six major reasons that oppose the transport and storage of [spent nuclear fuel/high level nuclear waste] at the Holtec site."[622] In his report, Dr. Schafersman generally describes the

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618. Joint Pet'rs Pet. at 88.

619. *Id.*

620. *See* Steven Schafersman, Ph.D., *Geological Report Documenting and Opposing Use of the Holtec Site in New Mexico to Store High Level Nuclear Wastes* (2018) [hereinafter Schafersman Report].

621. *Id.*

622. Schafersman Report at unnumbered p. 1.

geology[623] and hydrology[624] of the region, and puts forth his ideas concerning "several scientific, economic, political, and anecdotal reasons that make it inadvisable to store high-level nuclear wastes" at the proposed HI-STORE UMAX storage facility.[625]

Joint Petitioners Contention 12 is inadmissible because it does not comply with the Commission's strict-by-design contention admissibility standards.[626] Merely referencing a report that does not identify specific portions of the license application does not comply with the Commission's specificity requirements.[627] The Schafersman Report does not provide sufficient information to show that a genuine dispute exists with Holtec's license application;[628] indeed, the Schafersman Report does not even mention the Holtec application (save for one reference to Figure 3.3.2 in the Environmental Report to establish that the top of the Salado Formation below the Holtec storage facility is 1400 feet below the facility) and does not challenge any aspect of the application.

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623. *Id.* at unnumbered pp. 1-16.

624. *Id.* at unnumbered pp. 16-20.

625. *Id.* at unnumbered pp. 20-30.

626. *Millstone*, CLI-01-24, 54 NRC at 358.

627. *See NextEra Energy Seabrook LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 332 (2012); *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 348 (1998) ("Mere reference to documents does not provide an adequate basis for a contention.").

628. 10 C.F.R. § 2.309(f)(1)(vi).

The Commission's contention admissibility rules require petitioners seeking intervention "to read the pertinent portions of the license application, including the [SAR] and the Environmental Report, [and] state the applicant's position and the petitioners' opposing view."[629] The Schafersman Report does not meet this requirement.[630]

Joint Petitioners Contention 12 is not admitted.

13. Joint Petitioners Contention 13

Joint Petitioners Contention 13 states:

> Pursuant to 10 C.F.R. [§] 2.309(f)(3), Petitioners move to adopt all contentions filed by the Sierra Club in this proceeding and to re-allege them as their own as if written herein.[631]

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629. Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989).

630. Further, several of Contention 12's claims are outside the scope of this proceeding. *See*, *e.g.*, Schafersman Report at 4 (exploring the supposition that a "large militia group can take over the facility, declare themselves an independent state" and threaten to destroy the storage facility should authorities try to take back the facility); 21 (alleging the facility will be permitted for 120 years and the fuel will never be moved to a permanent repository); 22 (discussing "our poorly-regulated American free enterprise system" where corporations internalize gains and externalize losses at the expense of the environment).

631. Joint Pet'rs Pet. at 88.

To adopt a contention, a participant must have demonstrated standing in their own right and have themselves proffered an admissible contention.[632] As Joint Petitioners have done neither, they may not adopt any of Sierra Club's contentions.

Joint Petitioners Contention 13 is not admitted.

14. Joint Petitioners Contention 14

Joint Petitioners Contention 14 states:

Section 186 of the Atomic Energy Act (AEA) (42 U.S.C. § 2236) provides that a license issued by the NRC may be revoked for any material false statement in the license application. Holtec has made a material false statement in its license application in this case by stating repeatedly that title to the waste to be stored at the [consolidated interim storage] facility would be held by DOE and/or the nuclear plant owners. This false statement was repeated in Holtec's Answers to Sierra Club's Contention 1 and [Joint Petitioners'] Contention 2.

The statement that nuclear plant *owners* might retain title to the waste is shown to be false by a January 2, 2019, e-mail message from Holtec to the public titled "Reprising 2018[.]" "Reprising 2018" states, "While we endeavor to create a national monitored retrievable storage location for aggregating used nuclear fuel at reactor sites across the U.S. into one (HI-STORE CISF) to maximize safety

632. *See Indian Point*, CLI-01-19, 54 NRC at 132-33.

and security, its deployment will ultimately depend on the DOE and the U.S. Congress."

Thus, if a false statement such as Holtec has made in its filings in this case is grounds for revoking a license, it is grounds for not issuing the license in the first instance.[633]

Joint Petitioners' Contention 14 is substantially identical to Sierra Club Contention 26. It is based on the same January 2, 2019 Holtec e-mail message to the public ("Reprising 2018"), and was submitted on the same day (January 17, 2019).

As discussed *supra*, the Board granted the motion to file Sierra Club Contention 26, but rejected the Contention as inadmissible. For the same reasons, we grant the motion to file Joint Petitioners Contention 14 and likewise rule it inadmissible.

Joint Petitioners Contention 14 is not admitted.

D. Fasken

Rather than submit a contention in response to the proceeding's *Federal Register* notice, Fasken instead filed a motion with the Commission to dismiss this proceeding as well as the *Interim Storage Partners LLC* proceeding, which involves a proposed interim storage facility that

633. Joint Pet'rs Motion to File New Contention, attach., [Joint Petitioners] Contention 14, at unnumbered p. 1.

would be constructed in Texas.[634] The Secretary of the Commission denied the motion and referred it for review under the NRC's contention admissibility standards.[635]

Fasken's contention states:

> The NRC lacks jurisdiction over the [application] because [it is] premised on the proposition that the U.S. Department of Energy ("DOE") will be responsible for the spent fuel that would be transported to and stored at the proposed [facility]. This premise is prohibited under the NWPA because the DOE is precluded from taking title to spent fuel until a permanent repository is available.[636]
>
> The NRC's acceptance and processing of the application[] conflicts with the essential predicate that a permanent repository be available before licensure of a [consolidated interim storage facility]. Further, processing the subject applications implies that the NRC disregards the NWPA's unambiguous requirement that spent fuel remain owned by and is the responsibility of reactor licensees until a permanent repository is available. The logic that underpins the plain language of the NWPA's requirement for a functioning permanent repository is effectively vitiated by processing the[] application []. [Fasken] contend[s] the [consolidated interim storage

634. Fasken Motion to Dismiss at 1-8.

635. Order Denying Motions to Dismiss.

636. Fasken Motion to Dismiss at 1-2 (citing 42 U.S.C. §§ 10222(a)(5)(A), 10143).

facility] applicant [] should be required to show cause why [its] application[] do[es] not constitute a violation of the NWPA since no permanent repository for spent nuclear fuel exists in the United States. Processing the[] application [] to licensure under the present circumstances invites the situation Congress was attempting to avoid because licensure of a CISF without an available permanent repository contradicts the NWPA's objective to establish a permanent repository. The prospect that any CISF will become a *de facto* permanent repository is precisely what the NWPA intends to avoid.[637]

Fasken's contention is similar to Beyond Nuclear's contention. However, its basis solely relies upon Beyond Nuclear's petition and incorporates by reference "the arguments and authorities in the Beyond Nuclear Inc. motion to dismiss at sections IV, V and VI."[638]

The Commission has approved the incorporation of contentions of other petitioners by reference, but only for those who have demonstrated standing and have submitted their own admissible contention themselves.[639] However, the Commission cautioned:

> Nor will we permit wholesale incorporation by reference by a petitioner who, in a written submission, merely establishes standing

637. *Id.* at 2 (citing Decl. of Tommy Taylor ¶ 8).

638. *Id.* at 7.

639. *Indian Point*, CLI-01-19, 54 NRC at 132.

> and attempts, without more, to incorporate the issues of other petitioners. Further, we would not accept incorporation by reference of another petitioner's issues in an instance where the petitioner has not independently established compliance with our requirements for admission as a party in its own pleadings by submitting at least one admissible issue of its own.[640]

Although Fasken demonstrated standing in this proceeding, it did not proffer a contention of its own—it only incorporated Beyond Nuclear's arguments and authorities by reference. Fasken would be permitted to do this if it had proffered its own admissible contention, but it did not.

Fasken's contention is therefore not admitted.

E. AFES

1. AFES Contention 1

AFES Contention 1 states:

> As a matter of law, the applicant has not performed a sufficient investigation and has not done a sufficient analysis to support that the Holtec site will not have a disparate impact on the minority and low income population of Lea and Eddy County.[641]

640. *Id.* at 133.

641. AFES Pet. at 11.

AFES objects to Holtec's site selection process, because it alleges that the siting process "entirely fails to account for *alternative sites*" for Holtec's proposed fuel storage facility.[642] AFES cites a licensing board decision, *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center),[643] alleging that *Claiborne* is akin to binding precedent upon this Board because that licensing board "addressed in detail what a licensing applicant must do to ensure that the site selection process to possess and use nuclear material is free from impermissible discrimination as to minority and low income populations."[644] AFES further alleges that Holtec violates NEPA, *Claiborne*, and Executive Order 12898 (which incorporates the topic of environmental justice into all executive agencies' NEPA reviews)[645] because it did not conduct a site selection process """"other than a cursory review of a report on a different site selection process"[646] and allegedly only relied "on the unsupported opinions" of the Eddy-Lea Energy Alliance (ELEA).[647]

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642. *Id.* at 17 (emphasis in original).

643. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 77 (1997), *aff'd in part, rev'd in part*, CLI-98-3, 47 NRC 77 (1998).

644. AFES Pet. at 11.

645. *See* Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations, Exec. Order 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994) [hereinafter Exec. Order 12898].

646. AFES Pet. at 18.

647. *Id.* at 19.

Appendix E

Environmental justice is a federal policy established in 1994 by Executive Order 12898 directing federal agencies to identify and address "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[648] The Commission's *Claiborne* decision clarified that NEPA requires the NRC to consider "social and economic impacts ancillary" to environmental impacts; that is, environmental justice concerns.[649]

In response to *Claiborne* and Executive Order 12898, the NRC promulgated its policy statement concerning environmental justice matters involving NRC licensing and regulatory actions.[650] The policy statement directs the Staff to conduct a more thorough analysis "if the percentage in the impacted area significantly exceeds that of the State or County percentage for either the minority or low-income population."[651] Although not binding regulations, NRC guidance documents specify that the applicant's Environmental Report should include "a discussion of the methods used to identify and quantify

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648. *See* Exec. Order 12898, 59 Fed. Reg. at 7629.

649. *Claiborne*, CLI-98-3, 47 NRC at 101.

650. *See* Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,040-41, 52,048 (Aug. 24, 2004) [hereinafter NRC Environmental Justice Policy Statement]. Because the NRC is an independent agency, Executive Order 12898 did not automatically apply to the NRC.

651. *Id.* at 52,048.

impacts on low-income and minority populations, the location and significance of any environmental impacts during construction on populations that are particularly sensitive, and any additional information pertaining to mitigation."[652] The NRC Staff considers "differences [of block groups compared to the state and county percentages of minority populations] greater than 20 percentage points to be significant" enough for an Environmental Report to warrant greater detail.[653]

We conclude that AFES Contention 1 is not admissible because AFES has not shown any legal requirement for Holtec to conduct a more in-depth inquiry into alternatives to the proposed action (i.e., the siting of the facility) or environmental justice analyses in its Environmental Report. Moreover, AFES has not cited any legal basis mandating Holtec to further analyze environmental justice impacts. Environmental Report section 3.8 describes the social and economic characteristics for the 50-mile region of influence (ROI) around Holtec's proposed facility.[654] Environmental Report section 3.8.5, titled "Environmental Justice," cites to and responds to Executive Order 12898 and the NRC Environmental Justice Policy Statement regarding the proposed storage facility's ROI. The Environmental Report's table 3.8.13

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652. Final Report, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG-1748 at 6-25 (Aug. 2003) [hereinafter NUREG-1748].

653. *Id.* at C-5.

654. *See* ER at 3-95.

identifies percentages of minority and low-income communities within the Holtec facility's ROI. Because Holtec did not find differences greater than 20 percent, as recommended by the NRC Environmental Justice Policy Statement,[655] Holtec did not consider environmental justice in greater detail than it already had. As AFES cites no other legal requirement for Holtec to consider environmental justice impacts in greater detail, the contention fails to show a genuine dispute with the application regarding a material issue of law or fact.

Insofar as the contention concerns Holtec's site selection process, where AFES alleges the Environmental Report "fails to account for alternative sites,"[656] (i.e., a contention of omission) the contention fails as well. The Environmental Report contains an analysis of location alternatives that explains the methodology of Holtec's selection of the proposed site,[657] and also shows six other potential sites that were analyzed and considered for suitability of the Holtec HI-STORE consolidated interim storage facility's characteristics.[658]

AFES Contention 1 is not admitted.

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655. *Id.* at 4-29.

656. AFES Pet. at 17.

657. *See* ER §§ 2.3, 2.4.2.

658. *Id.* at 2-27 (Fig. 2.3.1).

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2. AFES Contention 2

AFES Contention 2 states:

> As a matter of fact and expert opinion, the siting process will have a disparate impact on the minority and low income population of Lee and Eddy County.[659]

To support its assertion, AFES submits an affidavit from Professor Myrriah Gómez, Ph.D., that is entitled "Environmental Racism an Active Factor in the Siting and White Privilege Associated with the Holtec International HI-STORE Consolidated Interim Storage Facility Project."[660] Dr. Gómez claims that the proposal "is an example of environmental racism based on studies defining and documenting environmental racism across . . . the United States," and alleges that the proposed Holtec facility meets African-American civil rights leader Benjamin Chavis's definition of environmental racism.[661] AFES argues that "Holtec's reliance on an invitation for siting by a small group of government officials is a deficient process from the outset."[662]

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659. AFES Pet. at 22.

660. *Id.*, Ex. 7. Dr. Gómez holds a Ph.D. in English with a concentration in Latina/o literature and works as an assistant professor for the Honors College at the University of New Mexico.

661. *Id.*, Ex. 7, at 2-3.

662. AFES Reply at 22.

AFES Contention 2 is inadmissible because it does not show a genuine dispute with the application on a material issue of law or fact. As discussed *supra*, the environmental justice analysis in an applicant's Environmental Report is guided by the NRC's Environmental Justice Policy Statement and NUREG-1748, which were issued in response to Executive Order 12898. Holtec addressed environmental justice matters to the depth recommended by NRC guidance,[663] and neither AFES's petition nor Dr. Gómez's affidavit challenge the information in Holtec's Environmental Report. Rather, AFES Contention 2 challenges the NRC's environmental justice policy and implementing guidance documents themselves.[664]

AFES Contention 2 is not admitted.

3. AFES Contention 3

AFES Contention 3 states:

> There is no factual support for Holtec's primary site selection criterion, which is community support.[665]

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663. *See* ER at 3-113 (tbl. 3.8.13).

664. Because both AFES Contentions 1 and 2 are inadmissible, we need not address Holtec's motion to strike concerning these contentions. *See* [Holtec's] Motion to Strike Portions of Replies of [AFES], [Joint Petitioners], [NAC], and Sierra Club (Oct. 26, 2018) at 4-5.

665. AFES Pet. at 23.

Acknowledging that "community support" is not a material issue to the findings that the NRC must make to license the proposed facility, AFES points the Board to Environmental Report section 2.4.2 to clarify that Holtec "has made community support a material issue" regarding the proposed site selection criterion for two reasons.[666] First, AFES claims that, because Holtec has taken ELEA's support for the proposed facility as local "community support," Holtec has misrepresented the community support (or the lack thereof) in its application.[667] AFES alleges that this makes the issue of public support material to Holtec's application, in addition to the alleged violations by ELEA of New Mexico's Open Meetings Act.[668] Second, AFES contends that "Holtec cannot even demonstrate that the land under the site is "'controlled' by Holtec,"[669] which AFES alleges is the "lynchpin of Holtec's entire application."[670]

AFES Contention 3 is inadmissible because the issue of public support for the proposed facility is not material to the findings the NRC must make in this licensing proceeding. Assertion of community support or opposition in a license application does not lend any weight to the environmental justice analysis to be conducted by the

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666. *Id.*

667. *Id.* at 23-24.

668. *Id.* at 24.

669. *Id.* (citing ER, rev. 0 § 2.2.1).

670. *Id.*

applicant.[671] And, as discussed *supra*, an Environmental Report's environmental justice analysis may follow NUREG-1748, Appendix C, which Holtec chose to do. Because AFES points to no other source of law that places weight on "community support" with regard to the selection of a project site, the contention fails.

Although not expressly set forth in AFES Contention 3, AFES also raises, in its supporting bases, a claim that the ELEA acquired the proposed site (which it intends to sell to Holtec) in violation of the New Mexico Open Meetings Act.[672] These claims under New Mexico law against an entity that is not seeking a license from the NRC are plainly outside the scope of this proceeding.

AFES contention 3 is not admitted.

F. NAC

1. NAC Contention 1

NAC Contention 1 states:

> The Holtec CISF license application inadequately substantiates its design basis analyses concerning normal, off-normal, and accident events, which are required to demonstrate compliance with 10 C.F.R. Part

671. *See* Exec. Order 12898; NRC Environmental Justice Policy Statement; NUREG-1748.

672. N.M. Stat. Ann. § 10-15-1 (1978).

> 72, including Subparts E, F and G (and related acceptance criteria in NUREG 1567), as it lacks required design and safety information on the NAC canisters to be housed in the CISF UMAX casks.[673]

Because NAC has not licensed or otherwise provided its proprietary design information to Holtec,[674] it alleges that Holtec cannot comply with NRC safety-related requirements, as Holtec lacks required design and safety information on any NAC canisters that would be stored in the proposed facility. In support, NAC submits the affidavit of George C. Carver, its Vice President of Engineering & Licensing.[675]

As explained *supra* in connection with the Board's discussion of standing, however, Holtec is not presently seeking NRC approval to store any NAC canisters. NAC Contention 1 is therefore outside the scope of this licensing proceeding.

If and when Holtec seeks NRC permission to store NAC canisters, the necessary license amendment or amendments will provide NAC with an opportunity to participate, as Holtec acknowledges.[676] NAC's argument that future license amendment proceedings (if any) might

673. NAC Pet. at 10.

674. *Id.* at 4.

675. *Id.*, attach., Aff. of George C. Carver (Sept. 14, 2018).

676. Holtec Answer to NAC at 11.

be affected in some way by the present proceeding is not persuasive.[677] To speculate about the possibility of such an impact does not bring NAC's claims in Contention 1 within the scope of the present proceeding.[678]

NAC Contention 1 is not admitted.

2. NAC Contention 2

NAC Contention 2 states:

> The Holtec CISF application omits technical information required under NRC regulations, including but not limited to 10 C.F.R. § 72.24, about the design and safety performance of NAC canisters within its UMAX casks.[679]

Similar to its claims in Contention 1, NAC alleges in Contention 2 that, because Holtec does not have access to NAC's proprietary information, Holtec's license application omits required technical information about the design and safety performance of NAC canisters.

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677. *See* NAC Reply at 6-8.

678. The Board has also considered and rejected NAC's argument—first expressed in its petition and amplified in its reply—that Holtec is somehow seeking a "universal" license notwithstanding the more limited scope of its actual application. As set forth *infra*, the Board has denied as moot Holtec's motion to strike portions of NAC's reply that make this argument because we determine NAC's contentions are not admissible regardless of whether we consider its reply. *See* Holtec Motion to Strike at 9-10.

679. NAC Pet. at 10.

NAC Contention 2 is not admissible for the same reason NAC Contention 1 is not admissible. Holtec is not presently seeking NRC approval to store any NAC canisters, so NAC Contention 2 is outside the scope of this proceeding.

NAC Contention 2 is not admitted.

3. NAC Contention 3

NAC Contention 3 states:

> The Holtec CISF license application incorrectly omits a design alternatives analysis on the speculative grounds that the UMAX cask system is the only such system that is capable of including as contents all non-Holtec canister types.[680]

NAC alleges that, in its Environmental Report, Holtec incorrectly chose not to examine in detail the alternative cask designs of various competitors, including NAC. Specifically, Holtec identified but eliminated from detailed analysis design alternatives to "use the AREVA, NAC, and Energy*Solutions* systems.'DD'DD[681]

Although the NRC Staff would have us deny NAC's hearing request for failure to demonstrate standing, the Staff would otherwise not oppose the admissibility of

680. NAC Pet. at 14.

681. *Id.* (quoting ER, rev. 1 § 2.4.1).

NAC Contention 3 "to the extent that the [Environmental Report's] basis for eliminating these design alternatives from detailed analysis is unclear."[682] The Board does not agree. As Holtec's counsel stated during oral argument, "the purpose of this project is to deploy Holtec technology."[683] As a practical matter, it seems most unlikely that Holtec would elect in any circumstances to go forward with the project to deploy its competitors' storage technology.

Regardless, an applicant's Environmental Report is not required to include the type of alternatives analysis that NAC claims must be included. NAC does not allege any of the systems (including its own) that it claims Holtec should have analyzed in detail would have any lesser environmental impacts than Holtec's own HI-STORM UMAX system. Nor is any such difference apparent, as all of these competing systems are similar—comprised of canisters contained within casks.

To be sure, NEPA requires federal agencies (and hence the NRC requires applicants' Environmental Reports[684]) to take a hard look at the environmental impacts of a proposed action and of environmentally-significant alternatives. An applicant's discussion of alternatives in its Environmental Report must be sufficiently complete to aid the NRC in complying with NEPA.[685]

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682. NRC Staff Consol. Answer at 65.

683. Tr. at 267.

684. *See* 10 C.F.R. §§ 51.45, 51.61.

685. *Id.* § 51.45(b)(3).

But NEPA does not require a detailed analysis of alternatives that are of no environmental significance. As stated in the Council on Environmental Quality's implementing regulations, NEPA calls for consideration of reasonable alternatives to proposed actions "that will avoid or minimize adverse effects of these actions upon the quality of the human environment"[686] or that involve unresolved conflicts concerning alternative users of available resources.[687] NAC has not alleged that any such environmental impacts or unresolved conflicts would be associated with Holtec's use of its competitors' storage systems rather than its own.

As the Commission has reminded us, an environmental analysis "is not intended to be 'a research document.'"[688] If there are alleged omissions in the analysis, "in an NRC adjudication it is [the] Intervenors' burden to show their significance and materiality."[689] NAC has not done so.

NAC Contention 3 is not admitted.

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686. 40 C.F.R. § 1500.2(e).

687. *Id.* §§ 1501.2(c), 1502.1.

688. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010) (citation omitted).

689. *Exelon Generating Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 811 (2005).

Appendix E

V. INTERESTED GOVERNMENT PETITIONERS

Government entities (1) City of Carlsbad, New Mexico; (2) The Eddy-Lea Energy Alliance; (3) Lea County, New Mexico; (4) City of Hobbs, New Mexico; and (5) Eddy County, New Mexico timely filed requests to participate as an interested governmental body.[690] The NRC Staff stated that it "does not object to the participation of any of these governmental bodies . . . if a hearing is granted."[691] Neither Holtec nor any other petitioner has raised an objection.

Pursuant to 10 C.F.R. § 2.315(c), a local governmental body that is not admitted as a party under section 2.309 shall, upon request, be permitted a reasonable opportunity to participate in a hearing as an interested non-party. Section 2.315(c) does not require a demonstration of standing, but does require identification of those contentions on which the non-party intends to participate.[692]

As the Board denies all the petitioners' requests for a hearing, the motions of the City of Carlsbad, New Mexico; Eddy-Lea Energy Alliance; Lea County, New Mexico; City of Hobbs, New Mexico; and Eddy County, New Mexico are accordingly denied as moot.

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690. *See* ELEA Pet.; Lea Cty. Pet.; Carlsbad Pet.; Hobbs Pet.; Eddy Cty. Pet.

691. NRC Staff Consol. Answer at 3-4 n.11.

692. 10 C.F.R. § 2.315(c).

Appendix E

VI. RULING ON PETITIONS

Although Beyond Nuclear, Sierra Club, and Fasken have demonstrated standing in accordance with 10 C.F.R. § 2.309(d), no petitioner has proffered an admissible contention meeting the requirements of 10 C.F.R. § 2.309(f)(1). Therefore, in accordance with 10 C.F.R. § 2.309(a), the Board denies the requests for hearing and petitions for leave to intervene submitted by Beyond Nuclear, Sierra Club, Joint Petitioners, Fasken, AFES, and NAC.

VII. ORDER

For the foregoing reasons:

A. Beyond Nuclear's petition is *denied*. Beyond Nuclear's contention is *not admitted.*

B. Sierra Club's petition is *denied*. Sierra Club's contentions are *not admitted.*

C. Joint Petitioners' petition is *denied.* Joint Petitioners' contentions are *not admitted.*

D. Fasken's petition is *denied.* Fasken's contention is *not admitted.*

E. AFES's petition is *denied.* AFES's contentions are *not admitted.*

F. NAC's petition is *denied*. NAC's contentions are *not admitted.*

G. The petitions of City of Carlsbad, Eddy-Lea Energy Alliance, Lea County, City of Hobbs, and Eddy County to participate as local interested government bodies are *denied* as moot.

H. Holtec's October 26, 2018 motion to strike is *denied* as moot.[693]

I. Holtec's November 8, 2018 Motion for Leave to Reply to Alliance Response is *denied* as moot.[694]

J. Fasken's December 10, 2018 motion to file a supplemental declaration is *granted.*[695]

K. Joint Petitioners' and Sierra Club's January 11, 2019 motions to adopt each other's contentions are *denied* as moot.[696]

L. Sierra Club's and Joint Petitioners' joint motion for a subpart G hearing is *denied* as moot.[697]

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693. Holtec Motion to Strike.

694. [Holtec's] Motion for Leave to Reply to [AFES'] Response to [Holtec's] Motion to Strike (Nov. 8, 2018).

695. Motion for Permission to File Supplemental Standing Declaration of Tommy E. Taylor (Dec. 10, 2018).

696. Sierra Club's Motion to Adopt the Contentions of [Joint Petitioners] (Jan. 11, 2019); Motion of [Joint Petitioners] to Adopt and Litigate Sierra Club Contentions (Jan. 11, 2019).

697. Joint Motion to Establish Hearing Procedures by Sierra Club, [Joint Petitioners] (Jan. 3, 2019).

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M. Sierra Club's January 17, 2019 motion to late-file new Contention 26 is *granted.*[698]

N. Joint Petitioners' January 17, 2019 motion to late-file new Contention 14 is *granted.*[699]

O. Sierra Club's February 6, 2019 motion to amend its Contention 1 is *granted.*[700]

P. Beyond Nuclear and Fasken's February 6, 2019 motion to amend Beyond Nuclear's contention is *granted.*[701]

Q. Joint Petitioners' February 6, 2019 motion to amend their Contention 2 is *granted.*[702]

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698. Sierra Club's Motion to File a New Late-Filed Contention (Jan. 17, 2019).

699. Motion by [Joint Petitioners] for Leave to File a New Contention (Jan. 17, 2019).

700. Sierra Club's Motion to Amend Contention 1 (Feb. 6, 2019).

701. Motion by Petitioners Beyond Nuclear and Fasken to Amend Their Contentions Regarding Federal Ownership of Spent Fuel to Address Holtec International's Revised License Application (Feb. 6, 2019).

702. Motion by [Joint Petitioners] to Amend Their Contention 2 Regarding Federal Ownership of Spent Fuel in the Holtec International Revised License Application (Feb. 6, 2019).

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R. Sierra Club's February 18, 2019 motion to amend its Contention 16 is *denied.*[703]

S. Joint Petitioners' February 18, 2019 motion to amend their Contentions 4 and 7 is *denied.*[704]

T. Joint Petitioners February 25, 2019 motion to amend their Contention 2 is *denied.*[705]

U. Sierra Club's February 25, 2019 motion to file new late-filed Contentions 27, 28, and 29 is *denied.*[706]

V. This proceeding is *terminated.*

Any appeal of this decision to the Commission shall be filed in conformity with 10 C.F.R. § 2.311.

It is so ORDERED.

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703. Sierra Club's Motion to Amend Contention 16 (Feb. 18, 2019).

704. Motion of [Joint Petitioners] to Amend Their Contentions 4 and 7 Regarding Holtec's Decision to Have No Dry Transfer System Capability and Holtec's Policy of Returning Leaking, Externally Contaminated or Defective Casks and/or Canisters to Originating Reactor Sites (Feb. 18, 2019).

705. Motion of [Joint Petitioners] to Amend Their Contention 2 Regarding Holtec's Proposed Means of Financing the Proposed Consolidated Interim Storage Facility (Feb. 25, 2019).

706. Sierra Club Additional Contentions.

Appendix E

THE ATOMIC SAFETY AND LICENSING BOARD

Paul S. Ryerson
Chairman
Administrative Judge
Nicholas G. Trikouros
Administrative Judge
Dr. Gary S. Arnold
Administrative Judge

Rockville, Maryland May 7, 2019

APPENDIX F — STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 2013

Purpose of this chapter

It is the purpose of this chapter to effectuate the policies set forth above by providing for—

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(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

Appendix F

2. 42 U.S.C. § 2073

Domestic distribution of special nuclear material

(a) Licenses

The Commission is authorized (i) to issue licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, special nuclear material, (ii) to make special nuclear material available for the period of the license, and, (iii) to distribute special nuclear material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2)for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3)for use under a license issued pursuant to section 2133 of this title;

(4) for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter.

Appendix F

3. 42 U.S.C. § 2014

Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

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(e) The term "byproduct material" means—

(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material;

(2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content;

(3)

(A) any discrete source of radium-226 that is produced, extracted, or converted after extraction, before, on, or after August 8, 2005, for use for a commercial, medical, or research activity; or

(B) any material that—

(i)has been made radioactive by use of a particle accelerator; and

(ii)is produced, extracted, or converted after extraction, before, on, or after August 8, 2005, for use for a commercial, medical, or research activity; and

(4) any discrete source of naturally occurring radioactive material, other than source material, that—

(A)the Commission, in consultation with the Administrator of the Environmental Protection Agency, the Secretary of Energy, the Secretary of Homeland Security, and the head of any other appropriate Federal agency, determines would pose a threat similar to the threat posed by a discrete source of radium-226 to the public health and safety or the common defense and security; and

(B)before, on, or after August 8, 2005, is extracted or converted after extraction for use in a commercial, medical, or research activity.

***

. . .(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission. Except with

respect to the export of a uranium enrichment production facility, such term as used in subchapters IX and XV shall not include any equipment or device (or important component part especially designed for such equipment or device) capable of separating the isotopes of uranium or enriching uranium in the isotope 235.

***

. . .(cc)The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

4. 42 U.S.C. § 2133(a)

Commercial licenses

(a) Conditions

The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an

agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.

5. 42 U.S.C. § 2111

Domestic distribution

(a) In general

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material, except to the extent authorized by this section, section 2112 or section 2114 of this title. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed. ***

(b) Requirements

(1) In general

Except as provided in paragraph (2), byproduct material, as defined in paragraphs (3) and (4) of section 2014(e) of this title, may only be transferred to and disposed of in a disposal facility that—

(A) is adequate to protect public health and safety; and

(B)

(i)is licensed by the Commission; or

(ii)is licensed by a State that has entered into an agreement with the Commission under section 2021(b) of this title, if the licensing requirements of the State are compatible with the licensing requirements of the Commission.

(2)Effect of subsection

Nothing in this subsection affects the authority of any entity to dispose of byproduct material, as defined in paragraphs (3) and (4) of section 2014(e) of this title, at a disposal facility in accordance with any Federal or State solid or hazardous waste law, including the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

6. 42 U.S.C. § 2093

Domestic distribution of source nuclear material

(a) License

The Commission is authorized to issue licenses for and to distribute source material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2)for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3)for use under a license issued pursuant to section 2133 of this title; or

(4)for any other use approved by the Commission as an aid to science or industry.