

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of:)
)
Holtec International) Docket No. 72-1051
)
(HI-STORE Consolidated Interim Storage Facility)
)

In the Matter of:)
)
Interim Storage Partners) Docket No. 72-1050
)
(WCS Consolidated Interim Storage Facility))
)

**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**

INTRODUCTION

Movants Fasken Land and Minerals and Permian Basin Land and Royalty Owners hereby presents its Motion to Dismiss the the above-captioned matter based on the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. §10101, *et seq.* (“NWPA”) and the Administrative Procedure Act, 5 U.S.C. §§ 702(2)(A), 702(2)(C). Movants contend that U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) must dismiss the application of Holtec International (“Holtec”) to build and operate a centralized interim spent fuel (“CISF”) storage facilities in New Mexico and Interim Storage Partners, L.L.P. (“ISP”) to do the same in Texas. The NRC lacks jurisdiction over the applications because both are 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 facilities. This premise is prohibited under the NWPA

because the DOE is precluded from taking title to spent fuel until a permanent repository is available. 42 USC §§ 10222(a)(5)(A), 42 USC § 10143.

The NRC's acceptance and processing of the applications conflicts with the essential predicate that a permanent repository be available before licensure of a CISF. 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 these applications. Movants contend the CISF applicants should be required to show cause why their applications do not constitute a violation of the NWPA since no permanent repository for spent nuclear fuel exists in the United States. Processing these applications 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. (Taylor Declaration, para. 8).

**THE MOTIONS TO DISMISS SHOULD BE RESOLVED OUTSIDE
PENDING CISF LICENSING PROCEEDINGS.**

The motions to dismiss have been filed in the NRC's adjudicatory proceedings for Holtec and WCS in order to initiate the Commission's consideration of the motions. The *instant* motion raises the issue whether issuing licenses pursuant to Holtec's and ISP's CISF applications, in the absence of a permanent repository, is permitted by the NWPA. However, because the motions raise jurisdictional issues under the NWPA such do not require resolution of whether the applications conform to applicable requirements of the Atomic Energy Act ("AEA"), the National Environmental Policy Act ("NEPA") and pertinent NRC regulations at 10 C.F.R. §§

72.40, 51.101. Rather, the NWPA is the applicable law given the absence of a permanent repository.

FASKEN AND PBLRO HAVE STANDING TO BRING THIS MOTION.

For purposes of standing the participation of Fasken and PBLRO is consistent with the requirements in *Pac. Gas & Electric Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation) LBP-07-14, 56 NRC 413, 426 (2002). PBLRO is an association formed in response to the Holtec and ISC proposals for CISFs. (Taylor Dec., para. 3) Members of PBLRO are oil and gas producers and royalty owners. (*Id.*). PBLRO's purpose is to advocate on behalf of oil and gas producers and royalty owners who have substantial economic interests that are jeopardized by CISFs. The potential for harm to Fasken's interests parallels the potential for harm to other members of PBLRO. (Taylor Dec., paras. 5-8) No other petitioner/party nor the Applicants can adequately represent the interests of Fasken and the oil and gas producers and royalty owners in PBLRO. Fasken has individual standing based on these economic interests and as a member of PBLRO supports its organizational standing.

FASKEN AND PBLRO MEET TRADITIONAL STANDING REQUIREMENTS

Traditional standing anticipates injury-in-fact, causation, and redressability. *See Pac. Gas & Electric Co.*, LBP-02-23, 56 NRC at 426 (2002). Fasken and PBLRO satisfy the traditional standing requirements because harm to its members who live, work and travel on or along transportation routes that Holtec and ISP plan to use to transport spent nuclear fuel to the CISFs. *Duke*, LBP-01-35, 54 NRC at 417 (“[U]nwanted doses of ionizing radiation” from shipments of nuclear fuel transported “over the same public highways the Petitioners’ members travel” established standing because “incident-free shipping of plutonium provides a dose of ionizing

radiation, albeit small, to anyone next to the transport vehicle and a minor exposure to radiation, even one within regulatory limits, is sufficient to state an injury in fact.”).

Furthermore, there is a risk of radiologic harm from an accident caused by shipments of spent nuclear fuel being transported to the CISFs. *See e.g.*, Holtec Environmental Report 4-34 (the application analyzes “a spectrum of accidents that ranged from high-probability accidents of low severity and consequences to severe accidents with radiological consequences”). Highways in the area of Holtec are compromised and therefore make accidents more likely to involve radioactive waste shipments. *See e.g.*, *New Mexico GOP Governor Hopeful: Toll Roads for Oil Traffic*, Associated Press, KTBS (Aug. 21, 2018), https://www.ktbs.com/news/business/new-mexico-gop-governor-hopeful-toll-roads-for-oil-traffic/article_e8f4a10a-2542-5a9a-b64e-d0e6448c7bc8.html. Fasken and PBLRO members also may not be able to avoid radiological harm while travelling in the Permian Basin. The choice of routes is limited and travelers in the vicinity of a CISF may be unable to avoid radiological exposure and injury. *See Duke*, LBP-01-35, 54 NRC at 415. Moreover, the anticipated routes and methods of transport virtually assure that Fasken employees and members of PBLRO will be in close proximity to routine shipments of spent nuclear fuel and thereby exposed to unwanted radiation. *See Holtec Env. Report 2-4*, 3-105, 4-30.

As oil and gas producers and royalty owners, Fasken and PBLRO also have traditional standing based on CISF adverse impacts on property values. *See Kelley v. Selin*, 42 F.3d 1501, 1509–10 (6th Cir. 1995) (“Petitioners are clearly asserting a threatened injury. The injury can be fairly traced to respondents’ actions since petitioners allege that it is the storage of spent nuclear fuels in the VSC–24 cask that has the potential to interrupt enjoyment of their lakefront property and to diminish its value. Finally, a decision in their favor could redress the threatened harm.”);

see also Louisiana Energy Servs., L.P. (Claiborne Enrichment Ctr.), CLI-98-3, 47 N.R.C. 77 (1998). Close proximity to nuclear facilities and transportation routes for spent nuclear fuel may decrease property values as soon as a nuclear facility is licensed. And a radiological release that interferes or precludes continued production in the Permian Basin implicates the interests of Fasken and PBLRO. Accordingly, Fasken and PBLRO meet the requirements for traditional standing.

FASKEN AND PBLRO MEET STANDING REQUIREMENTS UNDER THE PROXIMITY PRESUMPTION

NRC recognizes standing may be based on the proximity presumption. *Tennessee Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 3 (2002) (“This so-called proximity or geographical presumption ‘presumes a petitioner has standing to intervene without the need specifically to plead injury, causation, and redressability...’ ”); *Armed Forces Radiobiology Research Inst.* (Combalt-60 Storage Facility), ALAB-682, 16 NRC 150, 154 (1982) (The “proximity to a large source of radioactive material establishes petitioner’s interest.”). Where the “nature of the proposed action and the significance of the radioactive source” create an “obvious potential for offsite consequences,” the NRC applies a presumption of standing to individuals residing, owning property, or having frequent and regular contacts within the radius of those potential offsite consequences. *Consumers Energy Co.* (Big Rock Point Indep. Spent Fuel Storage Installation), CLI-07-19, 65 NRC 423, 426 (2007) (quoting *Exelon Generation Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-581 (2005)); *see also Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995); *USEC, Inc.* (Am. Centrifuge Plant), CLI-05-11, 61 NRC 309 (2005).

Fasken has oil and gas interests approximately two miles from the proposed Holtec CISF site. PBLRO member D.K. Boyd has property near the ISP proposed facility. (Taylor Declaration, para. 3). These distances meet the proximity test for standing. The determination of the radius “beyond which . . . there is no longer an ‘obvious potential for offsite consequences’” is made on a case-by-case basis. *Exelon Generation Co. LLC & PSEG Nuclear, LLC* (Peach Bottom Atomic Power Station, Units 2 & 3), CLI-05-26, 62 NRC 577, 580-81 (2005). Licensing Boards have found standing based on proximity to spent nuclear fuel ranging from 4,000 feet to 17 miles that both Fasken and PBLRO satisfy. (Taylor Declaration, para. 3). *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142 (1997); *Pac. Gas & Elec. Co.*, LBP-02-23, 56 NRC at 428. The standard for assessing the potential for offsite consequences is whether the consequences are plausible, not whether consequences are probable or likely. *Cfc Logistics, Inc.*, LBP-03-20, 58 NRC 311, 320 (2003) *citing Ga. Inst. of Tech.* (Georgia Tech Research Reactor) CLI-95-12, 42 NRC 111 (1995) (Commission found standing based on a “plausible scenario, albeit a highly unlikely one, in which three independent redundant safety systems—all designed to function under normal circumstances—could simultaneously fail in a research reactor.”). It is plausible that radiological harm would impact Fasken’s interests situated two miles from the Holtec site and PBLRO member D.K. Boyd’s property near the ISP site.

The potential for offsite consequences from the Holtec CSIF is “obvious” due to the extraordinary volume of spent nuclear fuel anticipated for its facility. Holtec proposes to store a total of up to 173,600 MTU¹ of SNF. Further, Holtec recognizes at least one plausible scenario

¹ The final amount of spent nuclear fuel Holtec plans to store at the CISF is unclear. The Safety Analysis Report, 1-4 indicates 173,600 MTU as the maximum quantity of uranium for the CISF. But the Environmental Report at 3-104 specifies 3,000 canisters will be transported over 40

that would cause off-site radiological consequences stemming from stored SNF at its CISF. Safety Analysis Report 8-5 – 8-6 (flooded canister could result in criticality accident).

Fasken and PBLRO have standing to seek dismissal of the Holtec and ISP applications based on the proximity presumption because Fasken and PBLRO members own property and have frequent and regular contacts within the radius of potential obvious offsite consequences from the Holtec and ISP CISFs.

ARGUMENTS AND AUTHORITIES

Fasken and PBLRO incorporate by reference the arguments and authorities in the Beyond Nuclear Inc. Motion to Dismiss at sections IV, V and VI.

CONCLUSION

In enacting the NWSA's prohibition on establishing CISFs without an available permanent repository Congress intended that SNF would not end up stranded indefinitely in an interim facility. An interim facility that receives SNF would certainly relieve reactor owners of their responsibility to manage this waste stream. But this circumstance would also reduce the pressure to find a permanent repository. This is exactly what Congress did not intend. But Congressional intent, manifested by the prohibition on CISFs in the absence of a permanent repository, is in danger of being subverted if Holtec's and ISP's applications are processed and result in the issuance of one or perhaps, two licenses. The Commission should recognize that the

years. Holtec's ER at 1-1 states Holtec seeks authority to receive 500 canisters of SNF containing 5,000 metric tons of uranium (MTUs) Eventually, Holtec anticipates that approximately 10,000 canisters with 100,000 MTUs of SNF would be located at its CISF. 83 Fed. Reg. 32920 (July 16, 2018) ("Holtec is currently requesting authorization to possess and store 500 canisters of spent nuclear fuel (SNF) containing up to 8,680 metric tons of uranium (MTUs)"). Holtec's SAR, Table 1.0.1 at 1-4 indicates the CISF would eventually have 173,600 MTUs.

CISF licensing attempts of Holtec and ISP are futile under the NWPA and dismiss their applications.

Respectfully submitted,

/electronically signed by/
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Certificate of Service

Undersigned certifies that a true and correct copy of the above and foregoing was submitted to the NRC's Electronic Information System for filing and service on participants in the above-captioned dockets.

/signed electronically by/
Robert V. Eye