

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)	
)	

**BEYOND NUCLEAR’S REPLY TO OPPOSITIONS
TO HEARING REQUEST AND PETITION TO INTERVENE**

I. INTRODUCTION

Beyond Nuclear submits this Reply in response to NRC Staff’s Consolidated Response to Petitions to Intervene and Requests for Hearing Filed By: Alliance for Environmental Strategies, Beyond Nuclear, Inc., Don’t Waste Michigan, et al., NAC International Inc., and the Sierra Club (October 9, 2018) (the “NRC Staff Response”) and Holtec International’s Answer Opposing Beyond Nuclear Inc. Hearing Request and Petition to Intervene on Holtec International’s HI-STORE Consolidated Interim Storage Facility Application (October 9, 2018) (the “Holtec Response”) (collectively, the “Responses”), each addressing Beyond Nuclear’s Hearing Request and Petition to Intervene (filed September 14, 2018, and corrected on September 18, 2018) (the “Hearing Request”). As stated in the Hearing Request, Beyond Nuclear contends that its claims should be resolved in a separate proceeding on Beyond Nuclear’s Motion to Dismiss (filed in this docket on September 14, 2018, and corrected on September 18, 2018), and only filed its Hearing Request in an abundance of caution. In the event the Nuclear Regulatory Commission (“NRC” or the “Commission”) disagrees, and orders that the issues raised in Beyond Nuclear’s Motion to Dismiss should be addressed in this licensing proceeding, Beyond Nuclear addresses

arguments in opposition to its Hearing Request below. Beyond Nuclear seeks to ensure that errors and mischaracterizations in the Responses are not relied on in any decision relating to Beyond Nuclear's claims.

II. DISCUSSION

A. Beyond Nuclear has Standing.

As the NRC Staff acknowledges, Beyond Nuclear has standing.¹ NRC Staff Response at 8. Holtec, however, argues that Beyond Nuclear has failed to establish its standing by demonstrating that its members would be injured by their contacts with the proposed Holtec centralized interim spent fuel storage facility ("CISF") or associated transportation routes. Holtec also disputes the sufficiency of potentially depressed property values to confer standing on Beyond Nuclear. Holtec's arguments are without merit.

1. Beyond Nuclear has standing under the proximity presumption.

First, Holtec claims that Beyond Nuclear is not entitled to proximity-based standing. Holtec Response at 13. Holtec dismissively asserts that "because an [interim spent fuel storage facility] is essentially a passive structure," there is not a sufficient chance of harm from the Holtec CISF to confer proximity-based standing, even for Beyond Nuclear members living within one mile and daily frequenting the fence line of this enormous facility. Holtec Response at 16 (citing *Consumers Energy Co. (Big Rock Point ISFSI)*, CLI-07-19, 65 N.R.C. 423, 426 (2007)). In effect, Holtec argues that *Consumers Energy* entirely eliminates proximity-based standing for dry storage facilities based on their low risk level. But Holtec stretches that case far beyond its limits. There, the Commission found that the harm caused by *transfer of a license* for

¹ The NRC Staff Response provides that "the NRC Staff does not oppose Beyond Nuclear['s] ... demonstration of standing in this proceeding," and then explains how Beyond Nuclear established standing. NRC Staff Response at 8. The final sentence of the standing section of the NRC Staff Response, however, appears to accidentally omit the word "not." *Id.*

a storage facility was insufficient to support proximity-based standing at 50 miles. 65 N.R.C. at 426-27. The Commission reached no conclusion about the proximity standard for *construction and operation* of any facility, let alone a facility as large as the Holtec CISF. *Id.* And even for purposes of the license transfer, the Commission did not rule out the possibility that standing at a closer distance could be found. *Id.*

Based on applicable judicial and NRC precedents, Beyond Nuclear has standing to challenge the construction and operation of Holtec’s proposed CISF through the proximity of its members to the facility. In reviewing a challenge to a proposed permanent underground repository at Yucca Mountain, for example, the D.C. Circuit found that an organization’s member living 18 miles from the repository had standing simply by virtue of the fact that he “lives adjacent to the land where the Government plans to bury 70,000 metric tons of radioactive waste.” *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1266 (D.C. Cir. 2004). In contrast, the Holtec CISF would house twice the amount of spent fuel, in a surface facility that would be inherently more vulnerable to a loss of integrity and escape of radiation. And Beyond Nuclear’s members include individuals who live even closer to the CISF than the petitioners in *Nuclear Energy Institute* lived to Yucca Mountain.

Nor does *Nuclear Energy Institute* support Holtec’s argument that Beyond Nuclear was required to provide more detailed explanations of the potential harm caused to its members. *See* Holtec Response at 17. In *Nuclear Energy Institute*, the court applied a proximity-based standard without demanding scenarios for the escape of radiation from the repository, concluding that the petitioner’s proximity to such a large quantity of radioactive material posed “a sufficient harm in and of itself.” *Id.* Indeed, the court found the petitioner organization had standing even though it could take thousands of years for the actual harm to reach the affected member. *Id.* NRC’s

decisions are consistent with *Nuclear Energy Institute*. See NRC Staff Response at 8 n.37 (citing *Pac. Gas & Elec.*, LBP-02-23, 56 N.R.C. at 428 (proximity-based standing found at seventeen miles based on legal precedent rather than scenarios of escaped radiation)); *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation) LBP-98-7, 47 N.R.C. 142 (1998) (standing found at four miles); *N. States Power Co.* (Prairie Island Nuclear Generating Plant Indep. Spent Fuel Storage Installation), LBP-12-24, 76 N.R.C. 503, 508 (2012) (standing found at 600 yards).

Holtec simply ignores this line of decisions.

Accordingly, Beyond Nuclear has demonstrated proximity-based standing.

2. Transportation of spent nuclear fuel to the CISF will cause injury to Beyond Nuclear members.

Holtec mischaracterizes Beyond Nuclear's factual and legal arguments regarding injuries from transportation of spent fuel shipped to the proposed Holtec CISF. Holtec Response at 15. First, Holtec mischaracterizes the facts in its Environmental Report by stating that transportation routes of spent nuclear fuel to the Holtec CISF are "as-of-yet unidentified and unspecified." *Id.* To the contrary, the Holtec Environmental Report explains that "SNF is expected to be transported to the CIS Facility via rail" and that "a spur from [the end of the Burlington Northern Santa Fe ("BNSF") Carlsbad Subdivision] would be constructed to serve the Site." HI-STORE CIS Facility Environmental Report at 4-31 and 3-105 (Report No. HI-2167521) (Dec. 2017). Holtec's application also includes diagrams showing the existing rail line and the location of the spur. *Id.* at 2-9 (Figure 2.2.1) and 3-106 (Figure 3.9.1). Because Holtec does not state that it plans to build a new interstate rail line, it may be presumed that Holtec will use the existing BNSF Carlsbad Subdivision rail line and build a spur. Thus, Holtec's planned transportation route for spent fuel in the area of the proposed CISF is well-established. Beyond Nuclear has

standing from the injuries its members will receive from contacts with spent fuel that will be transported along this route in large quantities on a regular basis. *See* Hearing Request at 6.

Holtec also mischaracterizes the law regarding standing based on contacts with transportation routes. Holtec ignores the clear distinction in NRC cases between transportation related injuries based on geographic proximity to transportation routes (which fail to establish proximity standing) and concrete transportation related injuries that establish a clear causal nexus with the proceeding (which can establish traditional standing). Holtec Response at 6-7; *see Pac. Gas & Elec. Co.*, LBP-02-23, 56 N.R.C. at 434 (comparing *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility) LBP-01-35, 54 N.R.C. 403 (2001) (finding traditional standing from injury of exposure to radiation during transportation of spent fuel) with *Northern States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 N.R.C. 40 (1990) and *Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), LBP-77-59, 6 N.R.C. 518 (1977) (finding no standing based on statements of proximity to transportation routes and speculative allegations that an accident might occur in the proximity of petitioner). Contrary to Holtec's presentation, Beyond Nuclear does not allege that it has standing based on geographic proximity to transportation routes. Rather, following the Board's decision in *Duke Cogema Stone & Webster*, Beyond Nuclear establishes standing based on distinct injuries of radiological exposure from the transportation of spent fuel to the Holtec CISF. Hearing Request at 4-6.

Bizarrely, Holtec claims that *Duke Cogema Stone & Webster* was effectively overruled by subsequent decisions. Holtec Response at 15 (citing *U.S. Depart. of Energy* (Plutonium Export License), CLI-04-17, 59 N.R.C. 357 (2004); *Pac. Gas & Elec. Co.*, LBP-02-23, 56 N.R.C. at 433-34; and *Northern States Power Co.*, LBP-90-3, 31 N.R.C. at 43-44). But none of these cases overrules the Board's holding in *Duke Cogema Stone & Webster* that petitioners who

have regular contacts with transportation of radioactive material can establish standing based on their exposure to radiation emissions below regulatory limits from the transportation casks. *See Pac. Gas & Elec. Co.*, LBP-02-23, 56 N.R.C. at 434 (distinguishing *Duke Cogema Stone & Webster* from *Northern States Power Co.*). Indeed, *U.S. Depart. Of Energy* is entirely inapplicable. There, the Commission found that the petitioner failed to establish standing because it could not show a nexus between the agency's action of licensing a single shipment of radioactive material and the alleged harm that would result if terrorists attacked the shipment. The Commission found that the harm arose from a third party's illegal act and not the agency's action. 59 N.R.C. at 364-66. In *Duke Cogema Stone & Webster*, in contrast, the Board found that the petitioner had standing because it established that the alleged injury of exposure to radiation would be *caused by* the licensing of the nuclear facility and the many shipments of radioactive material that would be transported to the facility. LBP-01-35, 54 N.R.C. 403. Like the petitioners in *Duke Cogema Stone & Webster*, Beyond Nuclear's members' transportation-related injuries are sufficient to establish standing.

Further, Beyond Nuclear provided more than speculation that an accident involving the transportation of spent nuclear fuel may occur that would injure its members. *See* Holtec's Response at 15 (citing *Exxon Nuclear Co.*, LBP-77-59, 6 N.R.C. at 520 (rejecting standing based on mere statements that if an accident happened to occur during transportation of radioactive material 100 miles from the facility it would cause injury)). An accident is more likely to occur near Beyond Nuclear's members for three reasons. First, unlike transportation routes farther afield, every single ton of the total 173,600 metric tons of spent fuel proposed to be stored at the Holtec CISF must pass along the BNSF Carlsbad Subdivision along which Beyond Nuclear members live and travel. *See* Hearing Request at 6. Second, multiple Beyond Nuclear members

live near the final railyard where trains transporting spent nuclear fuel may stop before reaching the Holtec CISF; this delay would expose these member both to more radiation than if the trains just passed through and increase the chance of an accident occurring near them. *Id.* Third, the oil and gas boom has already overtaxed the transportation infrastructure near the Holtec CISF, making transportation more dangerous in this specific area. *Id.*

Accordingly, Beyond Nuclear's claims of injury from the transportation of spent nuclear fuel to the Holtec CISF are sufficient to establish traditional standing.

3. Beyond Nuclear members are threatened with the actual, concrete injury of decreased property values.

Finally, Holtec argues that the assertions of Beyond Nuclear's members concerning their diminished property values are too subjective to establish standing. Holtec Response at 16. In making this claim, Holtec relies entirely on the Board decision in *Strata Energy, Inc.* (Ross in Situ Recovery Uranium Project), LBP-12-3, 75 N.R.C. 164, 183-184 (2012). While the Board in *Strata Energy* did find standing for the petitioners, it declined to do so based on diminished property values. *Id.* The Board found unpersuasive the petitioner's claim, based on her "perception," that property values would be impacted from the presence of a uranium *in situ* leach mine miles downstream from her property, and it set forth examples of additional information the petitioner could have provided to persuade the Board otherwise. *Id.* at 184. But, contrary to Holtec's framing, the Board did not purport to establish a new requirement that all future petitioners must meet to establish standing based on property value decline caused by all types of proposed nuclear facilities, or even simply for the type of mining facility relevant in its decision. Instead, the Board made a much more limited finding that, "*in this instance,*" it could not afford standing based on property value decline alone. *Id.* The Board's reluctance in *Strata*

Energy to create a new standing requirement is unsurprising; to do so would run counter to decisions from courts and other Licensing Boards.

Beyond Nuclear’s members have provided factual support for their concerns about depressed property values by asserting that their property values will decrease due to proximity to the Holtec CISF, which may store thousands of metric tons of spent nuclear fuel. Similar assertions of diminished property values were found sufficient to confer standing in *Kelley v. Selin*, 42 F.3d 1501, 1509-10 (6th Cir. 1995), where the license applicant proposed to store much smaller quantities of spent fuel than Holtec.² NRC decisions have also found assertions of property value decline sufficient to establish standing. *Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-21, 54 N.R.C. 33, 44 (2001) (in a challenge to a license termination plan, the Board found an organization established standing when its members alleged in affidavits that, among other injuries, their “property values would be affected”); *see also Louisiana Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 N.R.C. 77, 108-109 n.26 (1998) (in a challenge to an Environmental Impact Statement, the Commission recognized that property values near an enrichment facility may be negatively impacted).

² The court also found in *Kelley* that the petitioner’s allegations of standing must be “accepted as true” and construed in the petitioner’s favor. 42 F.3d at 1508. *See also U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, & Pohakuloa Training Area, Island of Hawaii, Hawaii), LBP-10-4, 71 N.R.C. 216, 229 (2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“It is generally sufficient if the petitioner provides plausible factual allegations.”)). *But see Strata Energy, Inc.*, 75 N.R.C. at 177–78 (“if a petitioner’s factual claims in support of its standing are contested, untenable, conjectural, or conclusory, a board need not uncritically accept such assertions, but may weigh those informational claims and exercise its judgment about whether the standing element at issue has been satisfied.”). In light of these well-established precedents, it is not necessary for Beyond Nuclear to obtain expert declarations confirming that proximity to a nuclear facility injures property values when the NRC and courts already accept it as a likely injury.

Accordingly, Beyond Nuclear has provided sufficient support to establish standing based on its members' diminished property values.

B. Beyond Nuclear's Contention Satisfies All Aspects of the NRC's Admissibility Standard Except for Scope.

Holtec argues that Beyond Nuclear's contention fails to satisfy the NRC's admissibility standards in any respect. Beyond Nuclear agrees with Holtec on one aspect of its argument, but Holtec is wrong on the others.

Beyond Nuclear agrees with Holtec that its contention lies outside the scope of this NRC licensing proceeding. *See* Holtec Response at 18. As discussed in Beyond Nuclear's Hearing Request, the contention does not fall within the scope of the proceeding because violations of the Nuclear Waste Policy Act ("NWPA"), charged by the contention, are not a proper subject of the hearing. *Id.* at 10. Beyond Nuclear filed its contention in an abundance of caution, not because it considers the contention to be an appropriate topic for this licensing proceeding. Beyond Nuclear respectfully submits that the appropriate venue for consideration of its claim is a separate proceeding on Beyond Nuclear's Motion to Dismiss.

While Beyond Nuclear and Holtec agree on the issue of scope, Holtec errs in challenging the legal and factual accuracy of the contention. In order to ensure that Holtec's errors are not relied on in any decision relating to Beyond Nuclear's claims, we discuss them below.

1. Beyond Nuclear's contention does not mischaracterize the law.

In Header V.B, Holtec asserts that "NRC is Authorized to License the CISF." Holtec Response at 21. To support this proposition, Holtec cites two decisions upholding the unremarkable proposition that the NWPA does not prevent the NRC from licensing private, away-from-reactor, spent fuel storage facilities. *Id.* at 21 (citing *Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation) CLI-02-29, 56 N.R.C. 390 (2002); *Bullcreek v.*

Nuclear Reg. Comm'n, 359 F.3d 536 (D.C. Cir. 2004)). Neither of those decisions addresses the question at issue here: whether the NWPA precludes the licensing of a private facility that would store spent fuel *owned by the federal government and transported to the facility by the federal government*. As discussed at length in Beyond Nuclear's Motion to Dismiss, and incorporated into Beyond Nuclear's contention, the NWPA prohibits the federal government from taking ownership of spent fuel unless and until a repository has been licensed, built, and opened. Motion to Dismiss at 19-20. Thus, Beyond Nuclear's contention does not mischaracterize the law.

2. Beyond Nuclear's contention does not mischaracterize the facts.

Holtec does not dispute the accuracy of Beyond Nuclear's claim that (a) the Environmental Report lists the U.S. Department of Energy ("DOE") as the owner of spent fuel during transportation to the CISF, and that (b) the Environmental Report states construction of the CISF will not begin until Holtec has contracted with DOE for storage of the spent fuel. *See* Motion to Dismiss at 16. But Holtec points to other portions of its application which state that the customers of the CISF will be "either" the nuclear plant owner "or" the DOE. Holtec claims this alternative language shows that Holtec's application "is *not* based on DOE taking or holding title to the spent fuel which would be stored at the CISF." Holtec Response at 21 (emphasis in original). Holtec asserts that it will revise the Environmental Report to clarify its intent. *Id.* Thus, according to Holtec, Beyond Nuclear's contention is "based on an erroneous factual premise." *Id.*

Holtec's argument is unpersuasive from any angle. First, the Environmental Report shows that Holtec unequivocally assumes DOE will be the owner of spent fuel during transportation and storage. Thus, Beyond Nuclear has made no factual error regarding the

content of the Environmental Report. That Holtec may change the language of the Environmental Report in the future has no bearing on the question of whether Beyond Nuclear's contention accurately reflects the current content of the Environmental Report.

Second – and more importantly – even assuming for purposes of argument that Holtec's promise to revise the application in the future magically changes the application now, any revision to Holtec's application that assumes DOE as a possible owner of the spent fuel to be transported to and stored at the CISF would continue to violate the NWPA. By seeking approval of an operational scheme that *could* include DOE ownership of spent fuel, and therefore *could* result in NWPA violations if carried out, Holtec violates the NWPA. And by entertaining a license application containing provisions that would *approve and allow* Holtec to violate the NWPA, the NRC would also violate the NWPA. *Arizona Public Service Co., et al.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), LBP-82-117A, 16 N.R.C. 1964, 1991 (1964) (“[I]t would be improper for the Board to entertain a collateral attack upon any action *or inaction* of sister federal agencies on a matter over which the Commission is totally devoid of any jurisdiction.”) (emphasis added). *See also U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 N.R.C. 580, 605-06 (2009) (refusing to admit a contention challenging DOE's integrity as an applicant for a repository license where “Congress has already determined DOE as the appropriate license applicant, indeed the *only* appropriate applicant.”). The fact that Holtec *might not* violate the NWPA does not sanction an NRC licensing decision that would give Holtec the unchecked opportunity. To rule otherwise would violate not only the

NWPA, but basic principles of “comity” between federal agencies. *Arizona Public Service Co.*, LBP-82-117A, 16 N.R.C. at 1991.³

III. CONCLUSION

For the foregoing reasons, and in the event the Commission orders that the issues raised in Beyond Nuclear’s Motion to Dismiss should be addressed in this licensing proceeding,

Beyond Nuclear’s Hearing Request should be granted.

Respectfully submitted,

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³ For this reason, the NRC Staff’s argument that the contention should be admitted for purposes of addressing discrepancies between different parts of Holtec’s application is also without merit. NRC Staff Response at 66-67. The unlawfulness of Holtec’s license application stems from the assumption that DOE may be the owner of spent fuel during transportation or storage, not from inconsistencies in the application.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2018, BEYOND NUCLEAR'S REPLY TO OPPOSITIONS TO HEARING REQUEST AND PETITION TO INTERVENE was posted on the NRC's Electronic Information Exchange System.

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