

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE SECRETARY**

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

**RESPONSE BY PETITIONER ALLIANCE FOR ENVIRONMENTAL STRATEGIES
TO MOTION TO STRIKE BY HOLTEC INTERNATIONAL**

Petitioner Alliance for Environmental Solutions (“Petitioner” or “AFES”) hereby replies as follows to the Motion to Strike Portions of the Reply of AFES, filed by Holtec International (“Holtec”) on October 26, 2018.

I. Holtec Failed Properly to Consult Prior to filing Its Motion to Strike

The first undersigned counsel heard about Holtec’s proposed motion to strike was on October 25, 2018, when counsel received notice via a party other than Holtec that there was a request for consultation. Undersigned counsel immediately wrote to Holtec to request that email correspondence be directed to her correct email addresses, which are nlsimmons@swcp.com and nlsstaff@swcp.com. Undersigned counsel heard nothing further regarding consultation. Holtec’s Motion to Strike was not sent to undersigned counsel’s email address at nlsimmons@swcp.com. Indeed, undersigned counsel has received nothing from Holtec at nlsimmons@swcp.com. This omission is not only a violation of NRC rules, but demonstrates Holtec’s lack of interest in consultation; its consultation was merely *pro forma*. For this reason, Petitioner respectfully requests that the NRC deny Holtec Motion to Strike as to AFES.

II. Holtec's Argument Is Legally Frivolous

In its Motion to Strike, Holtec contends that the AFES Petition did not put Holtec on notice that AFES intended to raise the issue that Holtec's scoping process failed to address the cumulative impact of its site selection on the local community. There are two problems with this argument.

First, the Petition did, in fact, clearly raise the issue that Holtec's failure to study alternative sites would result in the additional proliferation of industrial and nuclear waste sites in Lea and Eddy County, and that such targeting would have a cumulative impact on the minority and low income community.

Second, Holtec argued in its Answer to the AFES Petition that AFES was required to base its environmental justice argument on a particular legal authority, namely the Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01 ("Policy Statement"). Holtec further argued that there was nothing in the Policy Statement that would support that Holtec's failure to address alternative sites was a valid criticism by AFES of Holtec's environmental impact study or its accompanying site selection scoping process. In fact, however, the Policy Statement supports that an adequate environmental impact statement does indeed include the question whether the targeting of Lea and Eddy County, based on the community's history of hosting or potentially hosting other similar sites, had a cumulative impact on the minority and low income community. *See* Consolidated Response by Petitioner Alliance for Environmental Strategies to Answers by Holtec and NRC Staff, filed October 16, 2018, at page 18. Petitioner was entitled to reply to this response by Holtec, by relying on the exact legal authority that Holtec pointed to as supporting its

contrary position.

Petitioner will address both of these points in turn.

Petitioner Raised Cumulative Impact in its Original Petition to Intervene

Replies must focus on the legal or factual arguments first presented in the original petition or raised in the answers to it. *Nuclear Management Co., LLC (Palisades Nuclear Plant)*, CLI-06-17, 63 NRC 727, 732 (2006); *Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 & 4)*, LBP-08-18, 68 NRC 533, 541-42 (2008). “It is appropriate, however, for a reply to respond to the legal, logical, and factual arguments presented in the answers, so long as new issues are not raised.” *PPL Susquehanna, LLC (Susquehanna Steam Electric Station, Units 1 & 2)*, LBP-07-4, 65 NRC 281, 301-02 (2007). Thus a reply memorandum may provide “legitimate amplification” to a contention. *Id.* at 299-302. Although “principles of fairness mandate that a petitioner restrict its reply brief to addressing issues raised by the Applicant’s or the NRC Staff’s Answers,” such a limitation:

. . . falls well short of prohibiting a petitioner from raising all new arguments. As long as new statements are within the scope of the initial contention and directly flow from and are focused on the issues and arguments raised in the Answers, fairness is achieved through the consideration of these newly expressed arguments.

Energy Nuclear Operations, Inc. (Indian Point Nuclear Generating Units 2 and 3), Docket Nos. 50-0247-LR and 50-286-LR, ASLBP No. 07-858-030LR-BD01 at 41 (p. 43 of .pdf)(July 6, 2011).

Here, AFES contends that by targeting the community of Lea and Eddy County, precisely because these communities were *previously used* as sites for industrial production sites and industrial and nuclear waste dumps, Holtec will necessarily add to the cumulative impact of all

these waste production and/or storage sites. In its Petition, AFES gave clear notice regarding this contention. For one thing, all three contentions in the AFES Petition address the targeting of Lea and Eddy County, which is simply another way to say that this community is being subjected to a proliferation of waste sites. By the same token, the opposite of targeting and the resulting proliferation of waste sites in a particular location would be a careful and reasoned analysis of alternative sites, which is part of AFES' request for relief and is also a point that clearly lays at the heart of all the contentions raised in the AFES Petition. The consideration of alternative sites also spreads out – either nationally or statewide – the potential siting of waste dump sites, thereby avoiding the proliferation of waste sites in a narrow location.

Quite simply, “dump,” a word used throughout the Petition, is a colloquial term that is synonymous with “accumulation.” There is a cumulative impact of accumulation, a fact of which undersigned counsel is acutely aware as she drafts this document in her cluttered den. For example, the “cumulative impact” of a city dump is the smell. “‘Cumulative impact’, in relation to an activity, means the impact of an activity that in itself may not be significant but *may become significant when added to the existing and potential impacts eventuating from similar or diverse activities or undertakings in the area.*” FINAL ENVIRONMENTAL IMPACT ASSESSMENT REPORT FOR THE PROPOSED MALUTI-A-PHOFUNG LANDFILL SITE, page 11 (emphasis added). Here, targeting results in dumping, dumping results in more dumping, and more dumping results in yet more dumping, which “may become significant when added to the existing and potential impacts eventuating from similar or diverse activities or undertakings in the area.”

Specifically, in its Petition to Intervene and Request for Hearing, filed on September 14,

2018 (“Petition”), AFES based its assertion of standing on several declarations submitted in support, which specifically referred to the potential “cumulative impact” of the dumping of yet more more industrial and/or nuclear waste on this community, or the locating of yet another industrial or nuclear site. *See* Petition at pages 4 (“We don’t want to be known as a waste dump city.”), 6 (potential injury from dumping includes “the perception and self-perception of her local minority community that Lea and Eddy County are becoming a national dumping ground for industrial and nuclear waste”), 8 (“We are overburdened with toxic effects on our water, lands, and air with a failed WIPP site, the Navajo refiner, oil and gas fracking causing depletion of limited water resources in our desert lands. We do not need a radioactive dump for further contamination.”), and page 9 (complaining about the “addition” of another nuclear waste site in Lea County). In its conclusion to its argument on standing, Petitioner stated that AFES wished to intervene “to object to the potential negative impact of the site selection process on the local minority and low income community, both *per se* and as a result of the *cumulative impact* of locating waste dumps generally and nuclear waste dumps specifically in this geographic area,” Petition at page 10 (emphasis added).

In its Petition, AFES asserted three contentions, **(1)** that as a matter of law, Holtec failed to perform 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, Petition at page 11; **(2)** that as a matter of fact and expert opinion, the siting process will have a disparate impact on the minority and low income population of Lea and Eddy County, Petition at page 22; and **(3)** that there is no factual support for Holtec’s primary site selection criterion, which is Holtec’s unsupported allegation that the site has received community

support. Petition at page 23.

In Contention 1, Petitioner complained about the effects of Holtec's failure to explore any alternative sites prior to selecting Lea and Eddy County. In support, Petitioner cited several legal authorities requiring Holtec to consider alternative sites, as a way to avoid the dumping of waste on this minority and low income community – this is the very definition of an environmental justice claim. In turn, the natural and logical consequence of dumping is the accumulation of numerous sites in these targeted communities, resulting in cumulative impact.

AFES asserted in Contention 1 that Holtec chose the site without considering any community outside of Lea and Eddy County. This resulted in what AFES referred to as “targeting,” which was clearly the equivalent of a complaint about the cumulative impact of the siting of numerous waste sites in Lea and Eddy County:

The very factor that was treated as “positive” by Holtec in terms of environmental justice – that unnamed local officials had already asked to be considered as a possible site – is, in fact, negative. Thus Holtec appears to believe that because this geographic area was *previously targeted for industrial and nuclear dumping*, this provides an “all clear” for *additional dumping*, when, in fact, the reverse is true – *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 in the United Church of Christ study cited by the Licensing Board in *Louisiana Energy 45*. See *Toxic Wastes and Race In the United States, A National Report on the Racial and Socio-Economic Characteristics of Communities With Hazardous Waste Sites,* cited with approval in *Louisiana 45*, 45 N.R.C. at 372–73.

Petition, pages 19-20 (emphasis added).

Contention 1 further asserts that in relying on “low population density” as a heavily weighted factor in selecting Lea and Eddy County, Holtec also “selected out” populated and popular areas. *Id.* at page 20. This will have the “result of dumping waste on minority, low

income, isolated rural communities.” *Id.*

In Contention 2, Petitioner’s expert explicitly states that New Mexico has continually suffered from the cumulative impact of nuclear sites beginning with the nuclear age. *See* Expert Report of Myrriah Gomez, attached to Petition as Exhibit 7 and incorporated therein by reference.

In Contention 3, Petitioner takes issue with the primary basis of the site selection of Lea and Eddy County, which was the alleged support of the site by the Eddy Lea Energy Alliance (“ELEA”). AFES presented evidence that ELEA does not, in fact, speak for the community. Again, AFES complained that residents were “never consulted about the location of an *additional* nuclear waste dump in their community,” and the “siting of *yet another* dump in southeastern New Mexico.” Petition at page 24 (emphasis added).

By insisting that Petitioner explicitly use the phrase “cumulative impact” in a specific contention, or lose the point entirely, Holtec misses the forest for the trees, and – more importantly – ignores the well-established tenet of NRC’s common law that technical perfection is not an essential element of contention pleading. *Private Fuel Storage, LLC, (Independent Spent Fuel Storage Installation)*, LBP-01-3, 53 NRC 84, 99 (2001); *Crowe Butte Resources< Inc. (North Trend Expansion Project)*, LBP-08-6, 67 NRC 241 (2008). It is not essential that pleadings of contentions be technically perfect. Licensing boards should be reluctant to deny intervention on the basis of skill of pleading where it appears that the petitioner has identified interests which may be affected by a proceeding. *Houston Lighting and Power Co. (South Texas Project, Units 1 & 2)*, ALAB-549, 9 NRC 644, 650 (1979). “It is neither congressional nor Commission policy to exclude parties because the niceties of pleading were imperfectly

observed. Sounder practice is to decide issues on their merits, not to avoid them on technicalities.” *Id.*, 9 NRC at 649; *Consumers Power Co. (Palisades Nuclear Plant)*, LBP-79-20, 10 NRC 108, 116-17 (1979); *Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station)*, LBP-87-17, *reconsideration denied on other grounds*, ALAB-876, 26 NRC 277 (1987).

Thus the NRC’s “contention admissibility rules do not require an intervenor to provide all supporting facts for a contention or prove its case on the merits in its original submission.”

Louisiana Energy Services, L.P., CLE-04-25, 60 NRC 223, 225 (2004), *reconsideration denied* LES, CLI-04-35, 60 NRC 619 (2004). Replies may appropriately “respond to the legal, logical, and factual arguments presented in the answers. . . .” *PPL Susquehanna, LLC, (Susquehanna Steam Electric Station, Units 1 & 2)*, LBP-07-4, 65 NRC 281, 301-302 (2007). This is precisely what AFES has done here, an argument to which Petitioner will now turn.

Petitioner Is Permitted to Reply to Holtec’s Response

AFES asserted in its Petition that Holtec was required to investigate alternative sites to avoid “dumping” on the local communities in Lea and Eddy County. In its Answer to the AFES Petition, filed October 9, 2018, Holtec argued that it was *not* required to investigate alternative sites for its dumping of nuclear waste, as asserted by AFES in its Petition. In support, Holtec insisted that the *Louisiana Energy* line of cases was “old news,” and that proper guidance would be found instead in the Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01 (“Policy Statement”). AFES disagrees entirely that the two authorities stand whatsoever in contradiction to each other, but was certainly not adverse to spending additional time perusing the Federal Register.

Voila! The Policy Statement explained that one purpose of the environmental justice portion of an environmental impact statement is to provide “a description of cumulative impacts.”

The Commission considers cumulative impacts when preparing an environmental impact statement for a proposed action. With regard to environmental justice matters, applicants are asked to provide NRC staff with a description of cumulative impacts to low-income and minority populations and socioeconomic resources, if applicable, in their environmental report (ER) *submitted with any license application*. NUREG-1748, 6.4.11.

Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 FR 52040-01, Response to Comment A.8, 52042-52043 (emphasis added), *as quoted in* Consolidated Response Filed by Petitioner Alliance for Environmental Strategies to Answer by Holtec and NRC Staff, filed October 16, 2018, at page 18. Petitioner therefore asserted in its Consolidated Response that the Policy Statement *also* supported that Holtec was indeed required to investigate the “cumulative impact” of its site selection process, which failed to account for any alternative sites.

Thus in its Response, AFES traced the “legal and logical” source of Holtec’s argument that targeting was an irrelevant concern, and cited back to Holtec the very authority Holtec relied upon to say the opposite was true. AFES responded that a study of alternative sites was, in fact, necessary for a valid environmental impact statement, and that such a study must include a review of the cumulative impact of the targeting done by Holtec in selecting Lea and Eddy County. Instead of studying the effects of dumping, Holtec’s original scoping process precipitously – indeed, immediately – narrowed the site selection to the current Holtec site, the very definition of dumping. With this response, Petitioner pointedly and directly responded to “legal, logical, and

factual arguments presented in” Holtec’s Answer. In sum, Petitioner properly replied to a controversy raised by Holtec in its Answer to the Petition – the point of the AFES Response was to make the case that the “cumulative impact” element of the contentions was apparent on the face of the original Petition.

Holtec may not create a controversy and then seek to bar the resulting counter-argument elicited by its objections. Indeed, Petitioner’s due process rights could be curtailed if it is not accorded a degree of flexibility in shaping its reply arguments. The D.C. Circuit has interpreted Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a) substantively, holding that “once a hearing on a licensing proceeding is begun, it must encompass all material factors bearing on the licensing decision raised by the requester.” *Union of Concerned Scientists v. United States Nuclear Regulatory Com’n*, 735 F.2d 1437, 1443 (D.C.Cir. 1984). The First Circuit has warned that the NRC’s Par 2 rules – some of which are analogous to Part 110 rules – “may approach the outer bounds of what is permissible under the [Administrative Procedure Act].” *Citizens Awareness Network, Inc. v. NRC*, 391 F.3d 338, 355 (1st Cir. 2004). Petitioner submits that its substantive and procedural due process rights must be considered simultaneously to any determination of the issues raised in the Motion to Strike.

Petitioner respectfully requests that the NRC deny the Motion to Strike.

/signed electronically by/

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November 1, 2018

CERTIFICATE OF SERVICE

I certify that on November 1, 2018 a true and correct copy of the foregoing was served via electronic submission to all counsel of record.

/signed electronically by/

Nancy L. Simmons