UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

Reply of Fasken and PBLRO to Interim Storage Partners, LLC's and Staff's Oppositions to Motion to Dismiss

I. Movants Fasken and PBLRO did not intend for its Motion to Dismiss to be analyzed under 10 C.F.R. § 2.309.

Movants did not intend for their Motion to Dismiss to be analyzed under 10 C.F.R. § 2.309.[1] Movants' intention was to have the Motion to Dismiss presented to the Commission and analyzed under the APA and NWPA. While the Secretary has authority under 10 C.F.R. § 2.346(i) to refer requests for hearings to the Atomic Safety and Licensing Board Panel (ASLBP), it is unprecedented for the Secretary to refer a Motion to Dismiss for consideration as a petition under 10 C.F.R. § 2.309. The legal substance of Movants' Motion to Dismiss is the same irrespective of whether it was brought under the APA, NWPA, or under Section 2.309. However, given the different procedural requirements, the Motion to Dismiss clearly will not comply with 10 C.F.R. § 2.309. Given that it is ultimately the duty of the petitioner, not the Secretary, to decide whether a contention is raised, Movant's Motion to Dismiss should not be analyzed as a contention under 10 C.F.R. § 2.309, but rather, as a Motion to Dismiss.

II. Movants Fasken and PBLRO have standing to advance their dispositive motion.

[1] NRC Staff also states as a threshold matter that "it is not clear that [Movants] even seek[] to litigate [the Motion to Dismiss] as a contention." NRC Staff's Response to Movants' Petition to Intervene and Request for Hearing at 31 (Nov. 23, 2018) (ML18327A071).

The Supreme Court has stated, in order to meet the "cases" and "controversies" jurisdictional requirement of Article III of the United States Constitution, the party invoking federal jurisdiction bears the burden of establishing, at a minimum, the following elements: (1) the plaintiff must have personally suffered a concrete "injury in fact" to a legally protected interest, or that such an injury is imminent or "certainly impending"; (2) the injury must be fairly traceable to the challenged action; and (3) it must be likely, as opposed to merely speculative, that a favorable decision will redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992). A plaintiff must also establish a fourth element where it challenges agency action under the Administrative Procedure Act (APA)—"parties seeking review under [the APA] must … establish that the injury he or she complains of 'falls within the "zone of interest" sought to be protected by the statutory provision whose violation forms the basis … [of the] complaint.'" *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883, 110 S.Ct. 3177, 3186 (1990). Although this "zone of interests" requirement will be denied if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute, *Thompson v. North American Stainless, LP,* 562 U.S. 170, 178, 131 S.Ct. 863 (2011), the requirement "is not meant to be especially demanding," *Soler v. Scott*, 942 F.2d 597, 605 (9th Cir. 1991), *vacated on other grounds*, 506 U.S. 969, 113 S.Ct. 454 (1992), and the interest a plaintiff seeks to vindicate need only have "a plausible relationship to the policies underlying the statute." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 107 S.Ct. 750, 757 (1987).

Under NRC case law, a party may be presumed to have fulfilled the judicial standards for standing based on geographic proximity to a facility or a source of radiation. *In the Matter of Consumers Energy Co.* (Big Rock Points ISFSI), 65 N.R.C. 423, 426 (Apr. 26, 2007). In operating license or construction permit proceedings the Commission adopted a proximity

presumption that allows an individual or group living, having frequent contacts, or having a significant property interest within 50 miles of a nuclear power reactor to establish standing without the need to make an individualized showing of injury, causation or redressability. *In the Matter of Nextera Energy Seabrook, LLC* (Seabrook Station, Unit 1), 86 N.R.C. 59, 74-75 (Oct. 6, 2017). This presumption rests on the Commission's finding … "that persons living within the roughly 50-mile radius of the facility 'face a realistic threat of harm' if a release from the facility of radioactive material were to occur." *Id.* at 75.

The NRC has held that the proximity presumption is sufficient to confer standing on an individual or group in proceedings under 10 C.F.R. Part 50 for significant license amendments as well. *Florida Power and Light Co.* (St. Lucie, Units 1 and 2), CLI-89-21, 30 N.R.C. 325, 329 (1989). One such example of proximity standing based on a significant licensing amendment comes from *In the Matter of Virginia Electric and Power Company* (North Anna Nuclear Power Station, Units 1 and 2), 9 N.R.C. 54, 56 (1979). The Commission held that proximity standing was presumed given the petitioner's proximity being a "stone's throw" away from the facility in an amendment proceeding where the licensee sought permission to expand the capacity of its facility's spent fuel pool. *Id.* Furthermore, the Commission stated that the Licensing Board should not consider whether the petitioner's stated concerns were justified until it reached the merits of the controversy. *Id.*

In order to clear up the basis of their holding in *Virginia Electric*, the Commission explained in a later decision that proximity was presumed in *Virginia Electric* not just because there was a significant amendment to an operating license expanding the capacity of a spent fuel pool, but rather, because the expansion of the capacity involved was related to the construction or operation of the reactor itself. *Florida Power and Light Co.* (St. Lucie Nuclear Power Plant,

Unites 1 and 2) 30 NRC 325, 329-30 (1989). The Commission explained that the construction and operation near the reactor itself would clearly implicate offsite environment which would ultimately lead to the potential for offsite consequences. *Id.* The Commission further stated that "absent situations involving such obvious potential for offsite consequences[--i.e., non-reactor licensing proceedings--]a petitioner must allege some specific 'injury in fact' that will result from the action taken…." *Id.*

That being said, the Commission in the earlier case of *In the Matter of Armed Forces Radiobiology Research Institute* (Combalt-60 Storage Facility) rejected the requirement that a petitioner in a case involving radiation from a non-reactor source needed to prove the traditional elements of standing in addition to showing a causal relationship between injury and the licensing action being sought. 16 N.R.C. 150, 153-154 (Jul. 16, 1982). In *Armed Forces*, the Armed Forces Radiobiology Research Institute (AFRRI) filed with the Commission an application for renewal of its Part 30 byproduct material license. *Id.* at 152. The license authorized AFRRI to possess up to 320,000 curies of radioactive cobalt-60 in a water-shielded irradiation facility located on the grounds of the National Naval Medical Center in Bethesda, Maryland, primarily for use in radiobiology research. *Id.* The inventory of radioactive cobalt at the facility at the time was described in affidavits as being "one of the largest in the United States." *Id.* at 154. After the NRC granted the license, petitioner CNRS, in a letter to the Secretary of the Commission, requested a hearing on the renewal of the license for the cobalt-60 facility. *Id.* at 152. The letter described an incident involving the storage facility in which the mechanism used to raise the cobalt-60 out of its shielding water "jammed," exposing the material "with its lethal gamma radiation" for a period of time. *Id*. Furthermore, the letter also stated that its members lived as close as three miles from a substantial source of radioactive material. *Id.*

Ultimately, the Commission stated that the proximity to a large source of radioactive material established the petitioner's interest that was arguably within the "zone of interest" of the Atomic Energy Act. *Id.* at 154.

As mentioned, the interest a plaintiff seeks to vindicate need only have "a plausible relationship to the policies underlying the statute," *Clarke,* 479 U.S. 403, 107 S.Ct. 757 (1987), which in this case is the Nuclear Waste Policy Act. 42 U.S.C. 10131 et seq.. The Movants' relationship to the policies of the NWPA is based on their proximity to the proposed CISF. The Commission's long-standing decision regarding the proximity presumption in *Armed Forces* follows most closely to the facts of the *instant* case.

The proposed CISF would be capable of storing large volumes of radioactive material away from nuclear reactors. PBLRO's member's properties and leases will be even closer to these facilities than CNRS' employees in the *Armed Forces* case, *supra*.. Just as *Armed Forces* held that CNRS had proximity standing due to AFRRI storing large sources of radioactive material--the largest radioactive cobalt supplies in the United States—here, Fasken and PBLRO will be neighbors with the proposed CISFs with their large concentrations of radioactive materials.

While the material projected for storage at ISP is different from that stored by AFRRI, the holding in *Armed Forces* focused on the "proximity" to *"large sources of radioactive material*" regardless of what the radioactive material was. *Id.* at 154 (emphasis added). Just as *Armed Forces* determined that there was nothing in *Virginia Electric* suggesting that the basic principles of proximity standing were limited to cases involving Part 50 licenses (i.e. operating licenses or construction permits), the holding in *Armed Forces* based on AFRRI's Part 30 licenses (i.e. licensing of byproduct material) equally applies to the Fasken's proximity standing

given "the concept of geographic proximity is not limited [by Parts]." *Id.* at 153. Therefore, regardless of the type of license, the presumption applied in *Armed Forces* applies to Fasken and PBLRO considering their proximity to the potentially largest concentration of spent nuclear fuel in the United States.

Given *Armed Forces*, Fasken and PBLRO have satisfied the burden of the proximity presumption. Fasken has met the burden of standing required by the APA based on the proximity presumption established in being in close proximity to a large source of radioactive material–in this case, spent nuclear waste—which is an interest within the "zone of interests" of the Atomic Energy Act. *Armed Forces,* 16 N.R.C. 154.

Accordingly, the Commission should reject ISP's arguments that Movants lack standing to advance their Motion to Dismiss.[2]

III. Arguments and Authorities

Movants incorporate by reference the arguments and authorities in the Beyond Nuclear Inc. Reply to Oppositions to Hearing Request and Petition to Intervene at II. B. 1-2, pp. 11-16.

Beyond Nuclear incorporates by reference the Reply of Movants Fasken and PBLRO to staff's Response to Motions to Dismiss filed in Docket 72-1051 on September 28, 2018.

[2] NRC Staff has determined Movants have demonstrated proximity-plus standing and organizational standing. See NRC Staff's Response to Fasken & PBLRO Petition to Intervene, pp. 3-6.

IV. Conclusion

Movants respectfully request that their Motion to Dismiss be sustained.

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.

/electronically signed by/
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