

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)

) Docket No. 72-1050

INTERIM STORAGE PARTNERS LLC)

(Consolidated Interim Storage Facility))

) December 10, 2018

**INTERIM STORAGE PARTNERS LLC'S ANSWER OPPOSING HEARING REQUEST
AND PETITION TO INTERVENE FILED BY DON'T WASTE MICHIGAN *et al.***

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), Interim Storage Partners LLC (“ISP”) submits this Answer opposing the “Petition . . . to Intervene, and Request for an Adjudicatory Hearing” filed by Don’t Waste Michigan (“DWM”), Citizens’ Environmental Coalition (“CEC”), Citizens for Alternatives to Chemical Contamination (“CACC”), Nuclear Energy Information Service (“NEIS”), Public Citizen, Inc. (“PC”), San Luis Obispo Mothers for Peace (“SLOMFP”), Sustainable Energy and Economic Coalition (“SEED”), and Leona Morgan (collectively, “Petitioners”) with the U.S. Nuclear Regulatory Commission (“NRC”) on the above-captioned docket on November 13, 2018 (“Petition”).¹ The Petition concerns ISP’s pending application for a 40-year specific license under 10 C.F.R. Part 72 to build and operate a Consolidated Interim Storage Facility (“CISF”) in Andrews County, Texas, referred to as the “WCS CISF” (the

¹ Petition of Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Public Citizen, Inc., San Luis Obispo Mothers for Peace, Sustainable Energy and Economic Coalition, and Leona Morgan, Individually, to Intervene, and Request for an Adjudicatory Hearing (Nov. 13, 2018) (ML18317A433). The Petition also included multiple declarations, discussed below.

“Application”).² As explained below, the Atomic Safety and Licensing Board (“Board”) should deny the Petition because Petitioners have failed to satisfy their affirmative burden to demonstrate standing, and have failed to submit an admissible contention.

Ms. Morgan seeks individual standing, and the remaining Petitioners seek representational standing on the basis that certain of their members purportedly have standing in their own right. As a preliminary matter, the standing declarations submitted by Petitioners largely consist of rote boilerplate assertions of speculative harms based on proximity to various transportation routes. However, many of those “fill-in-the-blank” declarations simply were not populated by declarants with specific details regarding their alleged interests, and therefore are insufficient to demonstrate standing. And SLOMFP, in particular, failed to timely submit *any* standing declarations by the deadline to submit hearing requests, thus requiring rejection of its claim to standing as a matter of law.

Moreover, presumptive standing is unavailable to parties alleging mere proximity to transportation routes; and none of the declarations contain sufficient assertions to demonstrate traditional standing. Generally speaking, the declarants’ asserted harms are speculative and unsupported, and their references to random transportation routes, with no nexus to this licensing proceeding, fail to satisfy the causation and redressability prongs of standing. Accordingly, the Petition must be rejected because none of the Petitioners satisfies their affirmative burden to *demonstrate* standing.

Setting aside their failure to establish standing, Petitioners also have failed to proffer an admissible contention. As explained below, each of Petitioners’ 15 proposed contentions suffers

² ISP, WCS CISF License Application, Rev. 2 (July 19, 2018) (ML18206A595) (including the Safety Analysis Report, Rev. 2 (“SAR”) and Environmental Report, Rev. 2 (“ER”).

from a combination of fatal defects for failure to satisfy each of the six elements of 10 C.F.R. § 2.309(f)(1). In general, Petitioners frequently misread or misinterpret the Application and other documents, raise multiple issues that are not material to this proceeding, ignore information in the Application that addresses challenged topics, and fail to explain, much less provide adequate support for, their proposed contentions. Accordingly, because Petitioners have failed to submit an admissible contention, the Petition must be denied for this second independent reason.

II. WCS CISF PROCEDURAL HISTORY

On April 28, 2016, Waste Control Specialists LLC (“WCS”) submitted to the NRC an Application for a specific license pursuant to 10 C.F.R. Part 72 for a CISF on its site located in western Andrews County, Texas. WCS currently operates Low-Level Waste and Mixed Waste facilities on this site.

On January 30, 2017, the NRC published a notice in the *Federal Register* announcing its acceptance of the WCS CISF Application and an opportunity to request a hearing and petition for leave to intervene.³ On April 18, 2017, WCS requested that the NRC temporarily suspend all review activities associated with its Application.⁴ Approximately 14 months later, by letters dated June 8, 2018, and July 19, 2018, ISP (a joint venture between WCS and Orano CIS, LLC) submitted a request to the NRC to resume review of the Application for the WCS CISF, and

³ See License Application; Docketing and Opportunity to Request a Hearing and to Petition for Leave to Intervene, 82 Fed. Reg. 8773 (Jan. 30, 2017) (“Original Notice of Hearing Opportunity”). On April 4, 2017, and in a corrected notice dated April 10, 2017, the NRC published in the *Federal Register* (82 Fed. Reg. 16,435; 82 Fed. Reg. 17,297) an order granting all petitioners an extension of time until May 31, 2017, to file hearing requests on WCS’s Application.

⁴ Letter from R. Baltzer, WCS, to NRC Document Control Desk (Apr. 18, 2017) (ML17110A206). On April 19, 2017, WCS and the NRC Staff jointly requested that the Original Notice of Hearing Opportunity be withdrawn, pending possible future resumption of the Application review. Joint Request to Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests (Apr. 19, 2017) (ML17109A480). On June 22, 2017, the Commission granted that request. *Waste Control Specialists LLC* (Consolidated Interim Storage Facility), CLI-17-10, 85 NRC 221, 222-23 (2017).

submitted an updated version of the Application (to revise the name of the applicant and make a few other changes).⁵

On August 29, 2018, the NRC published a notice in the *Federal Register* announcing its decision to continue reviewing the Application and providing a new opportunity to request a hearing and petition for leave to intervene on or before October 29, 2018.⁶ On October 2, 2018, a number of organizations and individuals submitted a consolidated request for an extension of the hearing request deadline.⁷ The Office of the Secretary issued an Order on October 25, 2018, extending the deadline 15 days to November 13, 2018.⁸ On November 13, 2018, Petitioners filed the instant Petition seeking a hearing and proposing 15 contentions.

III. PETITIONERS HAVE NOT DEMONSTRATED STANDING

A. Legal Standards for Standing

The Atomic Energy Act of 1954, as amended (“AEA”) allows individuals “whose interest may be affected” to intervene in NRC licensing proceedings.⁹ The Commission has long applied judicial concepts of standing to determine whether a petitioner’s interest provides a sufficient basis for intervention.¹⁰ “Essential to establishing standing are findings of (1) injury, (2) causation, and (3) redressability.”¹¹ Both an individual and an organization may assert standing. An organization may assert standing in its own right (*i.e.*, organizational standing), or

⁵ Although ISP is the new applicant name, the proposed facility name remains the “WCS CISF.”

⁶ See Interim Storage Partner’s Waste Control Specialists Consolidated Interim Storage Facility; Revised License Application; Opportunity to Request a Hearing and to Petition for Leave to Intervene; Order Imposing Procedures, 83 Fed. Reg. 44,070 (Aug. 29, 2018) (“Notice of Hearing Opportunity”).

⁷ Request for Extension on Deadline for Intervention (Oct. 2, 2018) (ML18276A066).

⁸ Office of the Secretary, Order (Oct. 25, 2018) (unpublished) (ML18298A335).

⁹ AEA § 189a (codified at 42 U.S.C. § 2239(a)).

¹⁰ *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-98-13, 48 NRC 26, 30 (1998).

¹¹ *EnergySolutions, LLC* (Radioactive Waste Import/Export Licenses), CLI-11-3, 73 NRC 613, 621 (2011).

may assert a right to represent the interests of its members (*i.e.*, representational standing), which requires a showing that: (1) its members would otherwise have standing in their own right; (2) the interests that the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires an individual member to participate in the proceeding.¹² In all cases, “[t]he petitioner bears the burden to provide facts sufficient to establish standing.”¹³

1. Presumptive Standing Based on Proximity to a Facility

In certain cases involving reactor facilities, the Commission will apply an automatic standing presumption based on proximity to the site.¹⁴ And in nuclear materials proceedings, such as this one,¹⁵ a petitioner may be entitled to the “proximity plus” presumption if it can affirmatively demonstrate that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences,”¹⁶ and that the petitioner’s interests lie within a radius of the facility such that they may “face a realistic threat of harm” from a release of radioactive material.¹⁷ However, the Commission has explained that “mere geographical proximity to *potential transportation routes* is insufficient to confer standing.”¹⁸ Thus, where a

¹² *PFS*, CLI-98-13, 48 NRC at 30-31.

¹³ *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 139 (2010).

¹⁴ *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 & 2), CLI-89-21, 30 NRC 325, 329 (1989).

¹⁵ *See Nuclear Fuel Servs., Inc.* (Erwin, Tennessee), CLI-04-13, 59 NRC 244, 248 (2004).

¹⁶ *Ga. Inst. of Tech.* (Ga. Tech Research Reactor), CLI-95-12, 42 NRC 111, 116 (1995).

¹⁷ *Calvert Cliffs 3 Nuclear Project, LLC & UniStar Nuclear Operating Servs., LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 917 (2009).

¹⁸ *U.S. Dep’t of Energy* (Plutonium Export License), CLI-04-17, 59 NRC 357, 364 n.11 (2004) (emphasis added).

petitioner alleges proximity to a potential transportation route as the basis for its standing, presumptive standing is unavailable and traditional standing principles apply.¹⁹

2. Traditional Standing

For traditional standing, a petitioner must establish that: (1) it has suffered or will suffer a distinct and palpable injury that constitutes injury-in-fact within the zones of interests arguably protected by the AEA or the National Environmental Policy Act of 1969, as amended (“NEPA”)); (2) the injury is fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision.²⁰ To demonstrate a distinct and palpable injury-in-fact sufficient to establish standing, the petitioner must demonstrate that the injury-in-fact is both “(a) concrete and particularized and (b) ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical.’”²¹ The mere ability to *imagine* circumstances where a party could be affected is not enough—the petitioner must demonstrate that “the injury is certainly impending.”²² In the NRC licensing context, “unsupported general references to radiological consequences are insufficient to

¹⁹ See generally *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii & Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 NRC 185, 188-89 (2010); *USEC, Inc.* (Am. Centrifuge Plant), CLI-05-11, 61 NRC 309, 311-12 (2005).

²⁰ *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 168 (1998) (citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996)); see also *N. States Power Co.* (Prairie Island Nuclear Generating Plant Indep. Spent Fuel Storage Installation), LBP-12-24, 76 NRC 503, 507-08 (2012) (citing *EnergySolutions*, CLI-11-3, 73 NRC at 621). Both the Commission’s Notice of Hearing Opportunity for this proceeding and its Rules of Practice require a petitioner to set forth: (1) the nature of its right under the AEA to be made a party to the proceeding; (2) the nature and extent of its property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order that may be issued in the proceeding on its interest. Notice of Hearing Opportunity, 83 Fed. Reg. at 44,071; 10 C.F.R. § 2.309(d)(1).

²¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Sequoyah Fuels Corp. & General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994).

²² *Nw. Airlines, Inc. v. Fed. Aviation Admin.*, 795 F.2d 195, 201 (D.C. Cir. 1986) (emphasis in original) (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)).

establish a basis for injury” to establish standing.²³ Accordingly, standing will be “denied when the threat of injury is too speculative.”²⁴

B. Summary of Petitioners’ Standing Claims

DWM, CEC, CACC, PC, SEED, NEIS, and SLOMFP seek representational standing in this proceeding,²⁵ and submitted member declarations purporting to show that their members have standing in their own right, and have authorized the organization to represent his or her interests in this proceeding.²⁶ Ms. Morgan seeks individual standing and submitted her own declaration.²⁷ Petitioners generally assert that Ms. Morgan and their respective members are “situated along many anticipated rail, highway, and barge routes by which [spent nuclear fuel (‘SNF’)] and GTCC wastes are likely to be transported from nuclear power reactor sites to the ISP site in Texas.”²⁸ The declarations primarily offer boilerplate standing assertions. As summarized by Petitioners, the declarations allege transportation-related injuries from:

the potential for radiation exposures as a result of being physically stuck in traffic proximate to truck or rail loads of SNF; exposures to spills and water runoff from accidents or leakage from SNF

²³ *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-92-23, 36 NRC 120, 130 (1992).

²⁴ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72 (finding detailed data and an expert affidavit demonstrating the technical plausibility of the alleged injury were sufficient to demonstrate standing) (citing *Whitmore v. Ark.*, 495 U.S. 488, 494 (1974); *L.A. v. Lyons*, 461 U.S. 95, 105 (1983)).

²⁵ Petition at 20.

²⁶ Individual Member Declarations of Don’t Waste Michigan (Oct. 29, 2018) (filed Nov. 13, 2018) (ML18317A439) (“DWM Declarations”); Member Declarations of Citizens’ Environmental Coalition (Nov. 13, 2018) (ML18317A436) (“CEC Declarations”); Individual Member Declarations of Citizens for Alternatives to Chemical Contamination (Oct. 29, 2018) (filed Nov. 13, 2018) (ML18317A435); Individual Member Declarations of Public Citizen (Oct. 29, 2018) (filed Nov. 13, 2018) (ML18317A440) (“PC Declarations”); Individual Member Declarations of Sustainable Energy and Economic Development (SEED) Coalition (Oct. 29, 2018) (filed Nov. 13, 2018) (ML18317A441) (“SEED Declarations”); Member Declarations of Nuclear Energy Information Service (Nov. 13, 2018) (ML18317A446) (“NEIS Declarations”); Notice of Filing of Member Declarations of San Luis Obispo Mothers for Peace (Nov. 17, 2018) (ML18321A002) (“SLOMFP Declarations”).

²⁷ Individual Declaration of Leona Morgan (Oct. 29, 2018) (filed Nov. 13, 2018) (ML18317A437) (“Morgan Declaration”).

²⁸ Petition at 7.

transport vehicles; downwind airborne radioactive exposure from defective transport containers; and possible radioactive contamination of water resources from accidents.²⁹

The declarations contain different names, addresses, organizational affiliations, and purported distances to a road, railroad, or body of water. Otherwise, declarants all generically assert that:

- they “studied Department of Energy [(“DOE”)] maps of rail and highway transportation routes” from a different proceeding;
- some transportation route is within a specified distance of the declarant’s home, work, or place of recreation; and
- such route “will likely be used to transport many cargoes of SNF and/or GTCC wastes to the WCS facility.”³⁰

As explained further below, the declarations offered by Petitioners do not demonstrate a concrete and particularized injury-in-fact that is fairly traceable to the proposed action here—*i.e.*, construction and operation of the WCS CISF—or that is redressable in this proceeding. Thus, Petitioners have not demonstrated representational standing, and the Petition must be denied.

C. Many of Petitioners’ Standing Declarations Are Facially or Procedurally Defective

Many of the member declarations submitted by Petitioners are facially deficient because the declarants did not populate the form-letter declarations with specific details regarding their alleged interests. In other words, those declarants did not bother to “fill in the blanks” on the generic form. For example, the space for identification of “one or more rail trackage/highway transport routes” has not been replaced with text referencing any *specific* railroad or highway in

²⁹ *Id.* at 13.

³⁰ *See, e.g.*, CEC Declarations (Declaration of Thomas Ellis ¶ 4); DWM Declarations (Declaration of Hedi Kaufman ¶ 4).

any of the declarations submitted by CEC, PC, SEED, or NEIS.³¹ And the parenthetical instruction for declarants to identify whether the interest they assert at a certain distance from that route is their “(home/place of work/place of recreation)” remains entirely unedited in most of those same declarations.³² Ultimately, these incomplete, form-letter declarations *per se* fail to provide sufficient detail to demonstrate an interest that may be affected here.³³ Accordingly, standing for CEC, PC, SEED, and NEIS should be denied on this basis alone.

Furthermore, SLOMFP failed to timely submit *any* member declarations by the extended deadline for submission of hearing requests in this proceeding.³⁴ As the Commission has explained, “[t]his omission is not merely a matter of failing to cross a ‘t’ or dot an ‘i.’”³⁵ Rather, representational standing must be denied altogether if a petitioner “submitted no authorization affidavits with its petition to intervene.”³⁶ SLOMFP’s untimely submission of those declarations does not cure this dispositive procedural defect.³⁷ Accordingly, because SLOMFP “submitted no

³¹ See generally PC Declarations, NEIS Declarations, CEC Declarations, and SEED Declarations (at ¶ 4 of each declaration). See also Morgan Declaration ¶ 4 (generically referencing “a main rail line”).

³² See generally PC Declarations, NEIS Declarations (Declaration of Arlene Hickory only), and CEC Declarations (the Declaration of Standing for Peter E. Swords does remove the parentheses, but adds an ambiguous “and/or” statement) (at ¶ 4 of each declaration).

³³ See, e.g., *FirstEnergy Nuclear Operating Co.* (Beaver Valley Power Station, Units 1 & 2; Davis-Besse Power Station, Unit 1; Perry Nuclear Power Plant, Unit 1), CLI-06-2, 63 NRC 9, 16 (2006) (citing *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 203 (2000) (holding that vague and general assertions unaccompanied by supporting factual details are insufficient to demonstrate standing).

³⁴ Compare Office of the Secretary, Order (Oct. 25, 2018) (ML18302A329) (extending the deadline to file a hearing request to November 13, 2018) with SLOMFP Declarations (filed four days late on November 17, 2018).

³⁵ *Entergy Nuclear Operations, Inc. et al.* (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 260 (2008).

³⁶ *Id.* at 261.

³⁷ *Id.* (“belatedly submit[ting] evidence regarding standing” is not curative). Moreover, SLOMFP admits that it lacks good cause for its untimely filing. See SLOMFP Declarations at 1 (noting the tardy filing was merely “counsel’s error”). Cf. *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station), ALAB-279, 1 NRC 559, 576-77 (1975) (experienced counsel are held to a high standard for procedural compliance).

authorization affidavits *with its petition to intervene*,” its claim to standing must be rejected as a matter of law.³⁸

D. Petitioners Have Not Demonstrated Traditional Standing

To the extent Petitioners assert that their members are entitled to presumptive standing based merely on their alleged proximity to a transportation route,³⁹ their assertion is contrary to settled law. The Commission has explained that “mere geographical proximity to *potential transportation routes* is insufficient to confer standing.”⁴⁰ Thus, proximity-based standing is unavailable to Petitioners here. Moreover, Petitioners’ and declarants’ vague claims of speculative harm along random transportation routes simply are insufficient to meet their burden to “demonstrate” satisfaction of all three elements of traditional standing. Accordingly, the Petition must be denied.

1. Petitioners’ Alleged Transportation Safety-Related Harms Are Outside the Scope of This Proceeding

Petitioners’ assertions of radiological injury⁴¹ amount to concerns regarding transportation safety. However, such concerns are not within the scope of this proceeding, and therefore cannot provide a basis for standing.

ISP’s Application seeks a specific license for an ISFSI under 10 C.F.R. Part 72; it does not request approval of any transportation package design or approval of any specific transportation route. On the other hand, the safety and security of SNF transportation is governed by the standards in 10 C.F.R. Parts 71 and 73 and through regulations issued by the

³⁸ *Palisades*, CLI-08-19, 68 NRC at 261 (emphasis added).

³⁹ Petitioners do not assert standing based on proximity to the facility.

⁴⁰ *DOE*, CLI-04-17, 59 NRC at 364 n.11.

⁴¹ Petition at 13.

Department of Transportation (“DOT”).⁴² For example, an *entirely separate application and approval process* are required for any planned road or rail routes over which SNF may be transported.⁴³ The appropriateness of the route selection—including whether SNF should (or should not) travel along the routes identified in the Petition and accompanying declarations—simply is not at issue in this proceeding. The Commission has recognized that alleged harms from activities separately authorized and regulated by transportation licensing and regulatory oversight regimes are insufficient to establish AEA-based standing in non-transportation licensing proceedings.⁴⁴ Ultimately, Petitioners’ claims in this regard fail to identify an interest that may be affected by *this* CISF licensing proceeding.

2. Petitioners’ Speculative Allegations of Transportation-Related Harms Fail to Demonstrate a Concrete and Particularized Injury-In-Fact

Even assuming transportation safety issues outside the scope of this proceeding somehow could provide a basis for standing here, Petitioners’ alleged sources of injury—namely, *de minimis* radiological exposures from dubious accident scenarios and chance encounters along allegedly-possible transportation routes—is conjectural or hypothetical at best, and certainly is not “concrete and particularized.”⁴⁵ Indeed, in 2011, the Commission categorically held that “[m]ere potential exposure to minute doses of radiation within regulatory limits *does not*

⁴² See 10 C.F.R. § 71.0, “Purpose and scope.” See also *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), LBP-99-34, 50 NRC 168, 176-77 (1999) (noting that “shipment of spent nuclear fuel [is] governed by Part 71 and do[es] not require a specific license under Part 72”).

⁴³ See 10 C.F.R. § 73.37(b)(1)(vi); see also NUREG-0561, Rev. 2, Physical Protection of Shipments of Irradiated Reactor Fuel § 2.1, “NRC Approval of SNF Shipment Routes,” 2.1.1, “Route Selection Criteria” (Apr. 2013) (ML13120A230).

⁴⁴ Cf., e.g., *EnergySolutions*, CLI-11-3, 73 NRC at 625 (finding radioactive materials transportation challenges outside the scope of an import/export proceeding); *UniTech Services Group, Inc.* (Export of Low-Level Waste), CLI-18-2, 87 NRC 78, 81-82 (2018) (finding claims of “chance highway encounters” and other transportation-related allegations of injury lacked a “sufficient nexus” to an export license proceeding to establish standing because transportation is “separately authorized . . . by transportation licensing” requirements).

⁴⁵ *Sequoyah Fuels*, CLI-94-12, 40 NRC at 72.

constitute a ‘distinct and palpable’ injury on which standing can be founded.”⁴⁶ Accordingly, Petitioners’ claims on this precise basis are insufficient to establish traditional standing.

First, “[t]he mere fact that . . . radioactive waste will be transported” does not, *per se*, demonstrate an injury-in-fact *vis-à-vis* a higher likelihood of an accident; and any asserted injury on this basis is “purely speculative and legally insufficient to demonstrate standing.”⁴⁷

Petitioners’ nearly identical arguments in this regard fail for these same reasons. Moreover, “tenuous assumptions” that a transportation accident “might occur” are “entirely speculative in nature,” and therefore fail to establish standing.⁴⁸ Petitioners, here, offer nothing more than “tenuous assumptions” that “spills,” “leakage,” and “contamination of water” somehow could occur.⁴⁹

Moreover, Petitioners’ attempts to lend credibility to their allegations of *harm* from speculative accident scenarios fail here. For example, Petitioners quote the ER and assert that “ISP openly admits . . . that there is a risk of radiologic injury.”⁵⁰ However, they clearly misread the document. Petitioners claim the ER acknowledges “rail casks could release radioactivity in ‘exceptionally severe accidents.’”⁵¹ However, that language is merely a quote from a generic NRC study explaining that “only rail casks *without* inner welded canisters” present such possibility.⁵² On the other hand, canisters sent to the WCS CISF must be “welded shut.”⁵³ To

⁴⁶ *EnergySolutions*, CLI-11-3, 73 NRC at 623 (emphasis added).

⁴⁷ *N. States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 43 (1990).

⁴⁸ *Exxon Nuclear Co.* (Nuclear Fuel Recovery & Recycling Ctr.), LBP-77-59, 6 NRC 518 (1977).

⁴⁹ Petition at 13.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² ER at 4-15 (citing NUREG-2125, Spent Fuel Transportation Risk Assessment at xxiv (Jan. 2014) (ML14031A323) (emphasis added)).

⁵³ Application at 2-1. *See also id.* at 3-4 (“only sealed canisters (welded) will be accepted for storage”).

the extent Petitioners assume or imply otherwise, they offer nothing more than a “tenuous assumption” insufficient to demonstrate standing.

Furthermore, Petitioners selectively quote the ER’s discussion of transportation accident scenarios as alleged support for their claimed injury.⁵⁴ However, they conspicuously omit the *conclusions* of those discussions, explaining that, “[t]he worst case release accident dose risk is estimated to be 2×10^{-19} rem,” for the damaged cask scenario, and 1.2×10^{-10} rem for the loss-of-shielding scenario.⁵⁵ By way of comparison, average natural background radiation is many orders of magnitude higher—approximately 0.62 rem per year.⁵⁶ As explained in the *Diablo Canyon* case, “simply showing the potential for *any* radiological impact, no matter how trivial, is not sufficient to meet the requirement of a showing of a ‘distinct and palpable harm’ under standing element one.”⁵⁷ An alleged radiological exposure “*four or five orders of magnitude* below average natural background radiation levels . . . clearly falls below the level that can be considered substantial enough for standing purposes.”⁵⁸ Such is the case here. Thus, Petitioners’ reference to these accident scenarios fails to show a distinct and palpable harm.⁵⁹

Petitioners’ alleged injury from being “stuck in traffic” near a shipment of SNF⁶⁰ fares no better. The NRC has generically concluded that the potential radiological exposures to members

⁵⁴ Petition at 13 (citing ER at 4-24, 4-25).

⁵⁵ ER at 4-24, 4-25.

⁵⁶ *Doses in Our Daily Lives*, NRC, <https://www.nrc.gov/about-nrc/radiation/around-us/doses-daily-lives.html> (last visited Nov. 27, 2018).

⁵⁷ *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 428 (2002) (emphasis added).

⁵⁸ *Id.* at 429 (emphasis added).

⁵⁹ Moreover, Petitioners’ reference to the CSR GEIS is entirely irrelevant. Petition at 13-14 (citing NUREG-2157, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel*; Final Report, Vol. 1 at lviii (Sept. 2014) (ML14196A105)). Petitioners appear to conflate “concrete overpack[s]” and *storage* casks (which are found at ISFSIs and were evaluated in the CSR GEIS), with *transportation* casks (in which SNF would be transported).

⁶⁰ Petition at 13.

of the public from routine transportation of SNF “are approximately four to five orders of magnitude less than the collective background radiation dose.”⁶¹ Thus, as a matter of law, the hypothetical and minute radiological exposures upon which Petitioners seek to establish standing fall far short of demonstrating an injury-in-fact.⁶²

3. Petitioners’ Vague References to General Transportation Routes Fail to Satisfy the Causation and Redressability Elements of Traditional Standing

Even assuming *arguendo* the harms alleged by Petitioners satisfied the injury-in-fact element, Petitioners are not entitled to standing because they fail to satisfy the remaining two elements: causation and redressability. In particular, the declarations do not provide sufficient support for their assertions that the *specific portions* of the transportation routes to which the declarants refer (to the extent they refer to specific routes at all⁶³) will be used to transport SNF or GTCC waste *to the WCS CISF*. A speculative assertion that some road, railroad, or body of water could—in theory—be used to transport SNF or GTCC waste *somewhere* simply falls short of the required demonstration for this proceeding. Declarants offer their lay opinions that these routes “will likely be used” to transport SNF and GTCC waste to WCS CISF. However, they offer no reasoned basis for their conclusory assertions.

Petitioners do not remotely plead sufficient facts to demonstrate a plausible chain of causation. By way of example, the Application seeks authorization to store SNF and GTCC waste only in *certain* dry cask storage systems.⁶⁴ Thus, Petitioners’ working assumption—that

⁶¹ NUREG-2125 at xxiv. *See also* ER at 4-14 to 4-15 (“All of the NRC’s assessments have concluded that the risk from radiation emitted from a transportation cask during routine, incident-free transportation is a small fraction of the radiation dose received from the natural background”).

⁶² *See EnergySolutions*, CLI-11-3, 73 NRC at 623; *Diablo Canyon ISFSI*, LBP-02-23, 56 NRC at 428.

⁶³ *See supra* § III.C.

⁶⁴ Application at 2-1 (seeking approval for storage of: NUHOMS® cask systems with the following canisters: FO-DSC, FC-DSC, FF-DSC, GTCC, 24PT1, 61BT, 61BTH; the NAC-MPC cask system with the following canisters: Yankee Class, Connecticut Yankee, LACBWR, GTCC-Canister-CY, and GTCC

any SNF or GTCC waste currently stored at any reactor or ISFSI could be transported to the WCS CISF under this Application—simply lacks a factual basis. Moreover, their assertions that routes near Fermi 2, Palisades, Diablo Canyon, and the Big Rock Point ISFSI⁶⁵ will “likely” be used to transport SNF to the WCS CISF are illogical, given that none of those sites utilize any storage system listed in the Application (*i.e.*, that ISP has requested authorization to store).⁶⁶ And the remaining declarants fail to specify any reactor from which shipments to the WCS CISF purportedly would originate. As this example demonstrates, Petitioners simply have not pled or alleged sufficient facts to demonstrate a plausible chain of causation.

Even assuming Petitioners had identified sites with compatible storage systems, they still could not plead a sufficient chain of causation, supported by facts, because any guesswork about transportation routes, at this stage, is pure conjecture. Route selection requires a separate, and future, application and approval process.⁶⁷ And many other things must happen first; for example, the WCS CISF must be licensed and constructed, which is not estimated to be complete until April 2022.⁶⁸ Furthermore, the *specific* locations of transportation origin must be identified after ISP negotiates contracts with *specific* customers. Ultimately, transportation routing

Canister YR; the NAC-UMS cask system with canisters in Classes 1 through 5, and GTCC-Canister-MY; and the MAGNASTOR cask system with casks TSC1 through TSC4).

⁶⁵ Petition at 21-23, 30-31 (Fermi 2), 24 (Palisades), 27 (Diablo Canyon), and 23, 30-31 (Big Rock Point).

⁶⁶ Fermi 2 uses the HI-STORM/MPC-68 system. *See, e.g.*, Letter from S. Maglio, DTE, to NRC, Independent Spent Fuel Storage Installation Cask Registration, Encl. at 1 (Aug. 24, 2016) (ML16238A032). Big Rock Point uses the FuelSolutions W150/W74 system. *See, e.g.*, Letter from Kurt M. Haas, Consumers Energy, to NRC, 10 CFR 50.59 Report of Changes, Tests and Experiments, Attach. 3 at 9-5 (Sept. 15, 2006) (ML062610419). Diablo Canyon uses the HI-STORM/MPC-32 system. *See, e.g.*, Letter from M. Haire, NRC, to J. Welsch, PG&E, Diablo Canyon Power Plant – NRC Inspection Report 05000275/2018003 and 05000323/2018003 and Independent Spent Fuel Installation Inspection Report 07200026/2018002, Encl. at 9 (Oct. 31, 2018) (ML18304A467). And Palisades uses the NUHOMS/32PT, NUHOMS/24PTH, VSC-24, and HI-STORM FW/MPC-37 systems. *See, e.g.*, Palisades Nuclear Plant, Updated Final Safety Analysis Report § 9.11.5 (Oct. 19, 2017) (ML17300A423).

⁶⁷ *See generally* 10 C.F.R. § 73.37(b)(1)(vi) (discussing NRC application process and referencing applicable DOT regulations).

⁶⁸ ER at 1-2.

decisions, which will be made by the cognizant regulators and ISP's customers (not ISP) on a shipment-by-shipment basis considering (among other things) certain technical and security criteria,⁶⁹ will not occur until many years—or even decades⁷⁰—from now. Meanwhile, the nation's transportation infrastructure will continue to shift and evolve. Thus, Petitioners' prognostications as to "likely" transportation routes amount to little more than baseless speculation.

Furthermore, declarants' citation to "Department of Energy maps of rail and highway transportation routes" from *another proceeding* demonstrates the absence of causation and redressability to their alleged injury in this proceeding. By citing these maps, Petitioners implicitly acknowledge that their assertions are essentially fungible with *other* actions involving transportation of SNF. Denying the ISP license would not redress Petitioners' generalized objection to transportation of SNF.⁷¹

Finally, even assuming *arguendo* Petitioners had adequately justified their conclusion, with supporting evidence, that the routes referenced in the "Department of Energy maps" "likely" would be used to transport SNF and GTCC waste to the WCS CISF, their alleged harm is simply too generalized to demonstrate standing. Petitioners claim that 218 million people across the United States—over 77% of the U.S. population⁷²—live within 50 miles of a transportation corridor

⁶⁹ NUREG-0561 §§ 2.1, 2.1.1.

⁷⁰ ER at 4-17 (noting transportation may occur over a period of 20 years).

⁷¹ *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-81-24, 14 NRC 175, 178-79 (1981); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-94-3, 39 NRC 95, 102 (1994); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138, 149 (2001), *aff'd*, CLI-01-17, 54 NRC 3 (2001); *see also Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 & 2), LBP-08-17, 68 NRC 431, 438 (2008); *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 & 4), LBP-08-16, 68 NRC 361, 378 (2008).

⁷² *See* U.S. Census Bureau, U.S. Summary: 2000; Census 2000 Profile at 2 (July 2002) ("Census 2000 Profile") (noting the total population of the United States in 2000 was 281,421,906), *available at* <https://www.census.gov/prod/2002pubs/c2kprof00-us.pdf>.

identified on those maps.⁷³ But this “‘generalized’ grievance shared in substantially equal measure by all or a large class of citizens” is not sufficient to support standing.⁷⁴

* * * * *

In summary, Petitioners have failed to demonstrate any concrete and particularized injury-in-fact that is fairly traceable to the proposed action here—*i.e.*, construction and operation of the WCS CISF—or that is redressable in this proceeding. Accordingly, standing must be denied and the Petition must be denied.

IV. PETITIONERS HAVE NOT SUBMITTED AN ADMISSIBLE CONTENTION⁷⁵

A. Legal Standards for Contention Admissibility

Under 10 C.F.R. § 2.309(f)(1), a hearing request “must set forth with particularity the contentions sought to be raised.” In addition, Section 2.309(f)(1) states that each contention must:

- (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) Provide a brief explanation of the basis for the contention;
- (iii) Demonstrate that the issue raised is within the scope of the proceeding;

⁷³ Petition at 87 (noting this figure was “based on 2000 Census data”) (citing Letter from J. Strolin, State of Nevada, to NRC Secretary, Docket ID: NRC-2009-0163, Proposed Rule, Physical Protection of Irradiated Reactor Fuel in Transit, 10 CFR Part 73, Encl., Attach. A at 4 (Apr. 8, 2011) (“Strolin Letter”), *available at* <http://www.state.nv.us/nucwaste/news2011/pdf/nv110408nrc.pdf>).

⁷⁴ *Metro. Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 333 (1983); *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 174 (1992).

⁷⁵ In each proposed contention, Petitioners repeat a boilerplate statement purporting to “incorporate all of the claims, allegations, and assertions set forth above as if fully rewritten herein.” *See, e.g.*, Petition at 41. To the extent this statement implies that the Board and the parties have some obligation to scour the Petition to identify arguments and connections between proposed contentions not otherwise identified by Petitioners, it is contrary to law. First, Petitioners bear the burden of identifying their contentions, and the alleged bases therefore, with the requisite level of specificity. *See* 10 C.F.R. § 2.309(f)(1). And second, the Board and the parties “cannot be faulted for not having searched for a needle that may be in a haystack.” *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 241 (1989).

- (iv) Demonstrate that the issue raised is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions, including references to the specific sources and documents that support the petitioner’s position and upon which the petitioner intends to rely; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.⁷⁶

Failure to comply with any one of these six admissibility requirements is grounds for rejecting a proposed contention.⁷⁷ These requirements are “strict by design.”⁷⁸ The rules were “toughened . . . in 1989 because in prior years ‘licensing boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation.’”⁷⁹ The purpose of the six criteria is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁸⁰ The Commission has explained that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing.”⁸¹

The petitioner alone bears the burden to meet the standards of contention admissibility.⁸²

Thus, where a petitioner neglects to provide the requisite support for its contentions, the

⁷⁶ 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). *See also Susquehanna Nuclear, LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), CLI-17-4, 85 NRC 59, 74 (2017) (reciting the six Section 2.309(f)(1) admissibility factors).

⁷⁷ *See Changes to Adjudicatory Process; Final Rule*, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); *see also Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999).

⁷⁸ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001).

⁷⁹ *Id.* (citing *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 334 (1999)).

⁸⁰ *Changes to Adjudicatory Process*, 69 Fed. Reg. at 2202; *see also Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43, 61 (2008).

⁸¹ *Changes to Adjudicatory Process*, 69 Fed. Reg. at 2202.

⁸² *See Entergy Nuclear Operations, Inc.* (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 325 (2015) (“[I]t is Petitioners’ responsibility, not the Board’s, to formulate contentions and to provide ‘the necessary information to satisfy the basis requirement’ for admission”); *id.* at 329; *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 149 (2015) (“[T]he Board may not substitute its own support for a contention.”).

presiding officer may not cure the deficiency by supplying the information that is lacking or making factual assumptions that favor the petitioner to fill the gap.⁸³ A contention that merely states a conclusion, without reasonably explaining why the application is inadequate, cannot provide a basis for the contention.⁸⁴ A “material issue” is one that would “make a difference in the outcome of the licensing proceeding.”⁸⁵ “[T]he petitioner must demonstrate that the subject matter of the contention would impact the grant or denial of a pending license application.”⁸⁶

A contention that challenges an NRC rule is outside the scope of the proceeding because, absent a waiver, “no rule or regulation of the Commission . . . is subject to attack . . . in any adjudicatory proceeding.”⁸⁷ This includes contentions that advocate stricter requirements than agency rules impose or that otherwise seek to litigate a generic determination established by a Commission rulemaking.⁸⁸ Similarly, any contention that collaterally attacks applicable statutory requirements or the basic structure of the NRC regulatory process must be rejected as outside the scope of the proceeding.⁸⁹ Accordingly, a contention that simply states the petitioner’s views about regulatory policy—or takes issue with the nature of existing regulations—does not present a litigable issue.⁹⁰

⁸³ See *Palisades*, CLI-15-23, 82 NRC at 329; *Fermi*, CLI-15-18, 82 NRC at 149; *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155 (1991).

⁸⁴ *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 472 (2006).

⁸⁵ *Oconee*, CLI-99-11, 49 NRC at 333-34.

⁸⁶ See *Indian Point*, LBP-08-13, 68 NRC at 62.

⁸⁷ 10 C.F.R. § 2.335(a).

⁸⁸ See *Turkey Point*, LBP-01-6, 53 NRC at 159-60, *aff’d*, CLI-01-17, 54 NRC 3 (rejecting the petitioner’s contention that a license renewal applicant was required to prepare a probabilistic risk assessment, where NRC regulations did not require such an analysis).

⁸⁹ *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Unit 1), LBP-07-11, 66 NRC 41, 57-58 (2007) (stating that a contention that attacks applicable statutory requirements “must be rejected by a licensing board as outside the scope of the proceeding”) (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-216, 8 AEC 13, 20 (1974)).

⁹⁰ See *Peach Bottom*, ALAB-216, 8 AEC at 20-21.

Equally important, the Commission has stated further that the petitioner must “read the pertinent portions of the license application . . . state the applicant’s position and the petitioner’s opposing view,” and explain why it disagrees with the applicant.⁹¹ If a petitioner believes the license application fails to adequately address a relevant issue, then the petitioner is to “explain why the application is deficient.”⁹² A contention that does not *directly controvert* a position taken by the applicant in the application is subject to dismissal.⁹³ For example, if a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine dispute.⁹⁴

B. Petitioners’ “Objection” Must Be Rejected

Petitioners include in their Petition an “objection,” which states:

There Is No Federal Authorization for DOE Support for the ISP
CISF And The License Application Must Be Dismissed.⁹⁵

Petitioners’ primary assertion is that:

the NRC lacks subject matter jurisdiction over WCS’s license application to the extent that it depends on having the U.S. DOE “take title to the SNF and transport it from existing storage sites across the U.S. to the CISF.” Accordingly, Petitioners object and move for the dismissal and termination of this licensing proceeding.⁹⁶

⁹¹ Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process; Final Rule, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989); *see also Millstone*, CLI-01-24, 54 NRC at 358.

⁹² Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also Palo Verde*, CLI-91-12, 34 NRC at 155-56.

⁹³ *See S.C. Elec. & Gas Co. et al.* (Virgil C. Summer Nuclear Station, Units 2 & 3), CLI-10-1, 71 NRC 1, 21-22 (2010); *Tex. Utils. Elec. Co. et al.* (Comanche Peak Steam Elec. Station, Unit 2), LBP-92-37, 36 NRC 370, 384 (1992), *vacated as moot*, CLI-93-10, 37 NRC 192 (1993).

⁹⁴ *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-04-15, 60 NRC 81, 95 (2004); *see also Summer*, CLI-10-1, 71 NRC at 21-22.

⁹⁵ Petition at 36.

⁹⁶ *Id.* at 40.

Absent from the discussion of this “objection,” however, is any indication of the procedural mechanism in 10 C.F.R. Part 2 under which it purportedly is lodged. Nevertheless, as explained below, to the extent it is offered as a motion, it is untimely and improper and must be denied; and to the extent it can be evaluated as a proposed contention, it is inadmissible for multiple reasons and must be rejected.

1. Petitioners’ Extraprocedural Motion Is Improper and Must Be Rejected

In their purported “objection,” Petitioners “*move* for the dismissal and termination of this licensing proceeding.”⁹⁷ Under the NRC’s general motion procedure in 10 C.F.R. § 2.323, such a motion is untimely by any measure,⁹⁸ and must be rejected as a matter of law for Petitioners’ failure to consult the other parties prior to filing.⁹⁹ More directly, the Office of the Secretary noted in a recent Order—rejecting nearly identical requests from other movants in this proceeding—that the NRC’s rules of procedure simply “do not . . . provide for the filing of threshold ‘motions to dismiss’ a license application.”¹⁰⁰ Accordingly, Petitioners’ motion here likewise should be denied as procedurally improper.

⁹⁷ *Id.*

⁹⁸ In essence, this motion seeks to challenge the NRC’s decision to review the Application in the first place—*i.e.*, its docketing decision. The NRC’s docketing decision on the WCS CISF Application was published in the *Federal Register* on January 30, 2017, more than a year and a half ago, and well past the 10-day deadline in 10 C.F.R. § 2.323(a)(2) to file a motion.

⁹⁹ 10 C.F.R. § 2.323(b) (“A motion *must be rejected* if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant’s efforts to resolve the issue(s) have been unsuccessful” (emphasis added)).

¹⁰⁰ Office of the Secretary, Order at 2 (Oct. 29, 2018) (unpublished) (ML18302A329).

2. Petitioners’ “Objection” Fails to Satisfy the Contention Admissibility Criteria in 10 C.F.R. § 2.309(f)(1)

Petitioners’ “objection” is largely based on their bare assertion that DOE is not authorized to “support” the WCS CISF.¹⁰¹ Petitioners make various related assertions to the effect that “[n]either 10 C.F.R. Part 72 nor the [Nuclear Waste Policy Act (“NWPA”)] authorize an ISP CISF financed” through DOE, and deriding a “federally-subsidized” alternative.¹⁰² Petitioners also appear to argue, without citation, that the NWPA somehow prohibits DOE from taking title to SNF. In essence, they claim that DOE is not a viable customer for ISP. Absent entirely from their filing, however, is any explanation of the bases for these conclusions. Petitioners do not even purport to identify the provisions of the NWPA that allegedly enact these prohibitions. Thus, at the most basic level, their “objection” lacks the requisite support for an admissible contention. And even assuming they had attempted to provide some explanation or support, the “objection” would fail for each of the reasons outlined in ISP’s Answer to Beyond Nuclear’s Hearing Request, raising these same issues.¹⁰³

As Petitioners correctly quote from several portions of the Application, ISP anticipates that *either* DOE *or* some other SNF title holder, such as a utility, may be ISP’s eventual customer(s).¹⁰⁴ Thus, as explained in ISP’s Answer to Beyond Nuclear’s Hearing Request, even assuming *arguendo* Petitioners’ unsupported interpretation of the NWPA was correct (*i.e.*, that DOE is not a viable customer for ISP), this circumstance would not preclude some *other* SNF title holder from being ISP’s customer. Accordingly, Petitioners identify no obstacle to any

¹⁰¹ Petition at 36.

¹⁰² *Id.* at 38, 39.

¹⁰³ ISP incorporates Section IV of that Answer here, by reference, as if republished in full. *See* Interim Storage Partners LLC’s Answer Opposing Beyond Nuclear, Inc.’s Hearing Request and Petition to Intervene § IV (Oct. 29, 2018) (ML18302A413) (“ISP Answer to BN Hearing Request”).

¹⁰⁴ Petition at 37-38.

necessary finding the NRC must make to issue an ISFSI license under Part 72.¹⁰⁵ Thus, the “objection” raised by Petitioners is immaterial in the context of this proceeding.

Moreover, to the extent Petitioners pepper their pleading with allegations of fraud, such as asserting ISP’s consideration of alternative business models is a “ruse” or a “decoy” designed to “conceal” ISP’s true intent,¹⁰⁶ their assertions are highly inappropriate, utterly unsupported, and completely untrue. Petitioners fail to provide *any* information even suggesting that private ownership of SNF—as specifically provided for in the Application—is impracticable for legal, commercial, or other reasons. And they certainly do not provide *any* support, whatsoever, to cast doubt on the veracity of ISP’s statements in the Application, which, by law, must be complete and accurate in all material respects.¹⁰⁷ The Commission has long declined to impute ulterior motives to licensees.¹⁰⁸

Finally, Petitioners’ other various assertions are likewise unsupported and immaterial. For example, Petitioners assert that, as to the possibility of either DOE or private entities being ISP’s eventual customer, “[t]he environmental impacts and implications of each option differ significantly.”¹⁰⁹ Not only do Petitioners fail to identify any support for this assertion, they do not even bother to explain it—a circumstance dispositive to its admissibility.¹¹⁰ Accordingly, when evaluated as a proposed contention, the “objection” is unsupported, immaterial, and fails to

¹⁰⁵ See ISP Answer to BN Hearing Request § IV.

¹⁰⁶ Petition at 39.

¹⁰⁷ See 10 C.F.R. § 72.11.

¹⁰⁸ *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-03-2, 57 NRC 19, 29 (2003); *Oyster Creek*, CLI-00-6, 51 NRC at 207 (“Absent [documentary] support, this agency has declined to assume that licensees will contravene our regulations.”); *Curators of the Univ. of Mo.* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 400 (1995).

¹⁰⁹ Petition at 39.

¹¹⁰ Merely stating “a conclusion (*e.g.*, the application is ‘deficient,’ ‘inadequate,’ or ‘wrong’) without providing a reasoned basis or explanation for that conclusion is inadequate” to demonstrate an admissible contention. *USEC*, CLI-06-10, 63 NRC at 472.

demonstrate a genuine dispute with the Application, and therefore is inadmissible in this proceeding.

* * *

For the reasons explained above, and those articulated in ISP’s Answer to Beyond Nuclear’s Hearing Request (incorporated by reference here), Petitioners’ “objection” should be rejected as procedurally improper and inadmissible under 10 C.F.R. § 2.323 and for failure to demonstrate an admissible contention under 10 C.F.R. § 2.309(f)(1).

C. Proposed Contention 1 (Segmentation) Is Inadmissible

Proposed Contention 1 states:

ISP states in the Application that “Transportation of the spent nuclear fuel shipping casks from the originating commercial nuclear reactor to the CISF . . . is not part of this License Application.” The exclusion from the ER—and by implication, from the EIS—of details and environmental impacts of a planned 20-year shipping campaign involving at least 3,000 deliveries of SNF and GTCC waste to ISP violates NEPA requirements that the transportation and storage aspects of the ISP plan be evaluated as a single, integrated project.¹¹¹

Petitioners describe this proposed contention as one of omission.¹¹² Petitioners also claim that ISP has engaged in impermissible “segmentation” under NEPA by separating “the indispensable transportation component of the project proposal from the storage component.”¹¹³

As explained below, Proposed Contention 1 is inadmissible for multiple reasons. First, the proposed contention inexplicably ignores the actual content of the ER, which addresses

¹¹¹ Petition at 41.

¹¹² *Id.* at 43.

¹¹³ *Id.* at 42. Segmentation occurs when an agency “avoid[s] the [NEPA] requirement that [an EIS] be prepared for all major federal action with significant environmental impacts by segmenting an overall plan into smaller parts involving action with less significant environmental effects.” *West Chicago v. NRC*, 701 F.2d 632, 650 (7th Cir. 1983). For the reasons discussed herein, ISP has not segmented the proposed action to eschew NEPA’s requirements. On the contrary, it has considered potential SNF and GTCC waste transportation impacts in the ER as a “connected action” and in a manner that fully complies with NEPA’s requirements.

radioactive material transportation impacts as a “connected action” under NEPA.¹¹⁴ Thus, the specific information Petitioners allege to be missing is, in fact, included in the ER. *There is no omission.* As such, Proposed Contention 1 lacks any factual support and fails to directly controvert the relevant portions of the ER. Additionally, Proposed Contention 1 seeks to litigate issues that are neither within the scope of this proceeding nor material to the NRC’s required findings under NEPA and Part 51. Accordingly, it must be rejected for failure to satisfy the contention admissibility requirements in 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

1. Proposed Contention 1 Ignores Relevant Information in the ER and Therefore Is Unsupported and Fails to Raise a Genuine Material Dispute

As noted above, Proposed Contention 1’s core claim is that ISP’s ER excludes analysis of the transportation-related impacts of the ISP project.¹¹⁵ Given that significant portions of the ER are devoted to that subject, Petitioners’ claim of omission is patently unfounded. Petitioners ignore ER Sections 3.2 (“Transportation”) and 4.2 (“Transportation Impacts”), which, as their titles alone indicate, contain discussion that is directly germane to Petitioners’ concerns.

¹¹⁴ See ER at 3-5 to 3-6, 4-9 to 4-22. As defined in Council on Environmental Quality (“CEQ”) regulations, “connected actions” are actions that: (1) automatically trigger other actions that may require environmental impact statements, (2) cannot or will not proceed unless other actions are taken previously or simultaneously, or (3) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.7. See also *Powertech USA, Inc.* (Dewey-Burdock In Situ Uranium Recovery Facility), LBP-15-16, 81 NRC 618, 697 (2015) (quoting 40 C.F.R. § 1508.7).

¹¹⁵ The above-quoted statement from page 1-3 of the Application (“Transportation of the spent nuclear fuel shipping casks from the originating commercial nuclear reactor to the CISF . . . is not part of this License Application”) in no way suggests that ISP has excluded from the ER consideration of the environmental impacts of SNF transportation. That statement indicates only that the potential transportation of SNF from commercial nuclear power reactors in accordance with NRC requirements in 10 C.F.R. Part 71 and plant-specific licenses is not part of the proposed action (construction and operation of the CISF) for which ISP seeks NRC authorization under 10 C.F.R. Part 72.

a. *The ER Fully Discusses the Potential Environmental Impacts of Transportation to and from the WCS CISF*

Contrary to Petitioners' claims, the ER describes the potential SNF transportation activities in detail, particularly as they would occur in the site vicinity or region.¹¹⁶ As ER Section 3.2 notes, DOE or SNF Title Holder(s) would be responsible for transporting SNF from commercial nuclear power reactors (both operating and shutdown/decommissioned reactors) to the WCS CISF.¹¹⁷ SNF would be transported from existing commercial nuclear power facilities across the U.S. using rail lines operated primarily by the Union Pacific Railroad to Monahans, TX.¹¹⁸ SNF subsequently would be transported by rail from Monahans, TX, approximately 105 miles north through Eunice, NM to the WCS CISF on existing rail owned and operated by the Texas and New Mexico Railway ("TNMR").¹¹⁹ The transportation *corridor* thus represents the rail operated by the TNMR from Monahans, TX to the WCS CISF.¹²⁰

¹¹⁶ As Petitioners note (*see* Petition at 45), 10 C.F.R. § 72.108 states that "[t]he proposed ISFSI . . . must be evaluated with respect to the potential impact on the environment of the transportation of spent fuel, high-level radioactive waste, or reactor-related GTCC waste within the region." Petitioners incorrectly state that "[t]he word 'region' is not defined in 10 C.F.R. Part 72" and presumes that it has a radius of 50 miles. Petition at 45. Section 72.3 defines "region" as "*the geographical area surrounding and including the site, which is large enough to contain all the features related to a phenomenon or to a particular event that could potentially impact the safe or environmentally sound construction, operation, or decommissioning of an [ISFSI].*" 10 C.F.R. § 72.3 (emphasis added). *See also* Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation; Final Rule, 45 Fed. Reg. 74,693, 74,695 (Nov. 12, 1980).

¹¹⁷ ER at 3-5.

¹¹⁸ *Id.* at 3-7, 3-89 (Fig. 3.2-2). As discussed in ER Section 3.2, heavy-haul trucks may be needed to move SNF over short distances from a decommissioned reactor site to an intermodal rail transfer facility. *Id.* at 3-6. The NRC analyzed the environmental impacts associated with using heavy haul trucks to transport SNF from a rail transfer facility to an interim storage facility in NUREG-1714. *Id.* (citing NUREG-1714, 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 (Dec. 2001) (ML020150217)). Because distances analyzed in the NUREG-1714 report are much greater than the distances between the shutdown decommissioned reactor sites and the rail transfer facilities, the environmental impacts analyzed in NUREG-1714 are bounding. ER at 4-10.

¹¹⁹ ER at 3-7.

¹²⁰ *Id.* at 3-7, 3-90 (Fig. 3.2-3). The TNMR rail lines are sufficient to transport SNF to the proposed CISF due to recent upgrades to the rail lines (Class 1) to accommodate the heavier loads than those expected to be transported to the CISF. *Id.* at 3-7.

WCS (a member of the ISP joint venture) operates a rail *spur* from Eunice, NM that encircles its facilities in Andrews County, TX.¹²¹ After SNF is transported along the transportation corridor from Monahans to Eunice, it would be transported by WCS along its rail spur via a locomotive to the Transfer Facility at the WCS CISF.¹²² ISP plans to construct a rail side track, approximately one mile in length, from the existing rail spur leading into the Transfer Facility at the WCS CISF.¹²³

ER Section 4.2.4 discusses radioactive material transportation impacts. Section 4.2.6 discusses the *radiological* impacts of transporting SNF and GTCC waste to the WCS CISF in particular.¹²⁴ As noted therein, the applicant performed a study of the radiological impacts associated with the transport of SNF to the proposed WCS CISF site from both operating and decommissioned sites.¹²⁵ That study is included as ER Attachment 4.1. The study used three representative rail routes to estimate bounding doses for normal (incident-free) transportation and potential accidents for proposed rail shipments to the WCS CISF, and for shipments from the WCS CISF to a proposed permanent geologic repository.

The results of incident-free radiation dose calculations are presented in ER Tables 4.2-4 through 4.2-7.¹²⁶ As summarized in ER Table 4.2-8, the additional doses that could result from transporting SNF from the 12 shutdown reactor sites by heavy haul truck to a rail transfer facility

¹²¹ *Id.* at 3-7.

¹²² *Id.*

¹²³ *Id.* at 3-7, 3-91 (Fig. 3.2-4).

¹²⁴ Non-radiological transportation-related risks are discussed principally in ER Section 4.9.2, which Petitioners also do not challenge in Proposed Contention 1.

¹²⁵ ER at 4-12 (citing “Transportation of Spent Nuclear Fuel to and from the Waste Control Specialist’s [sic] Proposed Consolidated Interim Storage Facility”).

¹²⁶ *See id.* at 4-18 to 4-21.

or a barge slip were determined to be small when added to the doses estimated for shipments on the three analyzed rail routes.¹²⁷

As discussed in ER Section 4.2.8, the study included in ER Attachment 4.1 also analyzed radiological transportation impacts that could potentially occur during off-normal events.¹²⁸ The study found the calculated dose risks to be small for all three types of accidents.¹²⁹

Based on the study and associated calculations summarized above, the ER concludes that radiological impacts for both incident-free transportation and accidents for shipments to and from the WCS CISF are small. It further concludes that these results are consistent with previous studies conducted by the NRC.¹³⁰ ER Section 4.2.6.2 briefly describes each of those NRC studies, all of which “have concluded that the risk from radiation emitted from a transportation cask during routine, incident-free transportation is a small fraction of the radiation dose received from the natural background.”¹³¹

Significantly, Proposed Contention 1 fails to mention—much less challenge—any of the ER discussion described above, including the radiological dose calculation assumptions, methodologies, and results presented in the ER at Chapter 4 and Attachment 4-1. Thus, contrary to their obligations under 10 C.F.R. §§ 2.309(f)(1)(v) and (vi), Petitioners have failed to either

¹²⁷ *Id.* at 4-22, 4-23 (Table 4.2-8).

¹²⁸ *Id.* at 4-23. The ER notes that the Type B transportation casks to be used to transport SNF to and from the WCS CISF are licensed in accordance with 10 C.F.R. Part 71 and constructed to withstand severe accidents, such that most transport accidents would not result in damage to the cask body or seals that would result in a release. *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 4-12, 4-14. Those studies include: NUREG-2125, “Spent Fuel Transportation Risk Assessment” (Jan. 2014); NUREG 1714, “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” (Dec. 2001); NUREG/CR-6672, “Reexamination of Spent Fuel Shipment Risk Estimates – Main Report” (Feb. 2000); and NUREG-0170, Vols. 1 and 2, “Final Environmental Statement on the Transportation of Radioactive Material by Air and Other Modes” (Dec. 1977).

¹³¹ ER at 4-14 to 4-16.

provide any support for their contention or challenge the specific portions of the ER relevant to their concerns. The ER sections described above make clear that the “omission” alleged by Petitioners does not actually exist, and that Proposed Contention 1 is thus inadmissible.

b. *NEPA Does Not Require Further Analysis of Transportation-Related Impacts Beyond That Presented in the ER*

Insofar as Petitioners suggest that NEPA requires more detailed or comprehensive analyses than those presented in the ER (which, again, Petitioners have ignored), their argument lacks legal support. For instance, Petitioners demand “complete disclosure of all probable transportation routes.”¹³² NEPA imposes no such requirement. Although NEPA requires that an “agency take a ‘hard look’ at the environmental consequences before taking a major action,”¹³³ an agency must apply a “rule of reason” in dealing with potential uncertainty.¹³⁴ Thus, ISP and the NRC may make “reasonable assumptions in [their] environmental analyses.”¹³⁵

As discussed above, ISP has done precisely that in its ER by analyzing, in bounding fashion, SNF transportation impacts based on representative routes. Notably, the NRC has used representative routes to evaluate transportation impacts in EISs on multiple occasions.¹³⁶ Although Petitioners allude to a wide range of possible transportation modes and routes that theoretically could be analyzed, they fail to explain why ISP’s approach in the ER is an

¹³² Petition at 43.

¹³³ *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983).

¹³⁴ See National Environmental Policy Act Regulations, 50 Fed. Reg. 32,234 (Aug. 9, 1985) (codified at 40 C.F.R. Part 1502) (“CEQ is concerned that the requirement to prepare a ‘worst case analysis’ in certain circumstances has been the impetus for judicial decisions which require federal agencies to go beyond the ‘rule of reason’ in their analysis of potentially severe impacts”).

¹³⁵ *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 759, 761 (9th Cir. 1996). See also *W. Org. of Res. Councils v. Bureau of Land Mgmt.*, 591 F. Supp. 2d 1206, 1228 (D. Wyo. 2008), *aff’d sub nom. BioDiversity Conservation Alliance v. Bureau of Land Mgmt.*, 608 F.3d 709 (10th Cir. 2010).

¹³⁶ See, e.g., NUREG-2157 at 5-52; NUREG-1714 at 5-39. See also 10 C.F.R. § 51.52, Table S-4 (deriving generic effects of transportation and fuel waste for one power reactor based on survey of then-existing power plants).

unreasonable method of analyzing and informing the public of the potential environmental effects of transportation of SNF to the facility.¹³⁷ Under NEPA, the relevant inquiry is not whether the assumptions made are “the best or whether it will turn out true, but ‘whether the [assumptions of the [ER or] FEIS were so distorted as to impair fair consideration of those environmental effects.’”¹³⁸ Proposed Contention 1 thus lacks adequate support and fails to raise a genuine material dispute for this additional reason.

2. Petitioners Raise Other Issues That Are Not Within the Scope of This Proceeding or Material to the Applicant’s and NRC Staff’s NEPA Analyses of the WCS CISF

Petitioners make a number of additional claims that are plainly outside the scope of this proceeding and immaterial to the NRC Staff’s environmental review for the proposed WCS CISF. They assert that, as part of its *transportation-related analysis*, ISP must: (1) determine whether Environmental Justice (“EJ”) populations may be disproportionately affected by shipments of SNF and GTCC waste; (2) ascertain whether there may be “more efficient” routing alternatives available; (3) determine the need for infrastructure upgrades or replacement actions on anticipated routes; and (4) promote assessments of risks to public health and property by those who will be asked to assume the burdens.¹³⁹ This information, Petitioners claim, is

¹³⁷ To the extent that Petitioners seek to litigate the specific routes that will ultimately be used by shippers, these issues are outside the scope of this proceeding. The DOT is responsible for overseeing vehicle safety, routing, shipping papers, emergency response, and shipper training. Challenges to DOT regulations and its regulatory scheme are plainly outside the scope of this proceeding. See *Duke Power Co.* (Catawba Nuclear Station, Units 1 & 2), LBP-82-51, 16 NRC 167, 172 (1982).

¹³⁸ *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004) (quoting *La. Energy Servs., L.P.* (Claiborne Enrichment Ctr.), CLI-98-3, 47 NRC 77, 89 (1998)). See also *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-15, 75 NRC 704, 726 (2012) (quoting *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-6, 75 NRC 352, 376 (2012), *petitions for review denied, Mass. v. NRC*, 708 F.3d 63 (1st Cir. 2013)) (NEPA “does not ‘require that [an agency] wait until inchoate information matures into something that [possibly] might affect [its] review.’ It requires [the agency] to conduct [its] review with the ‘best information available now.’”); *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225 (5th Cir. 2007) (holding that dredge and fill permit for residential subdivision development project was not improperly segmented because future phases remained in the planning stages).

¹³⁹ Petition at 43.

necessary for them to participate meaningfully in the NEPA process, and for state and local government officials and emergency responders to comprehend the scope of a SNF shipping campaign.¹⁴⁰

Each of the foregoing claims is predicated on the erroneous notion that ISP must identify “all probable transportation routes” as part of the instant CISF licensing action. It is both premature and impracticable for ISP to identify specific transportation routes, and to evaluate environmental impacts related to the use of those routes at this juncture. First, SNF transportation route identification requires separate review and approval by the NRC and other authorities and thus is outside the scope of this proceeding.¹⁴¹ Second, because ISP has not entered agreements with any customers (*i.e.*, nuclear utilities holding title to SNF, other entities owning SNF, or DOE) to store SNF at the WCS CISF, actual transportation routes are not presently known. Finally, optimal road and rail routes can change over time, as evidenced by the fact that the NRC generally approves road routes for five-year periods and rail routes for seven-year periods.¹⁴² Thus, identifying specific transportation routes now, particularly for the purposes cited by Petitioners, is premature and unnecessary. It also is inconsistent with the

¹⁴⁰ *Id.*

¹⁴¹ SNF transportation must comply with NRC and DOT regulations, specifically 10 C.F.R. Parts 71 and 73, and 49 C.F.R. Parts 107, 171-180, 390-397, as applicable to the mode of transport. 10 C.F.R. § 73.37(b)(1)(iv) requires that routes used for shipping SNF comply with applicable DOT requirements. DOT requirements for road shipments are found in 49 C.F.R. Parts 172 and 397. DOT requirements for rail shipments include those contained in 49 C.F.R. Parts 172, 174, and 209. DOT regulations also allow States or Tribes to review and approve highway routing for SNF shipments. *See* 49 C.F.R. § 397.3.

¹⁴² *See* NUREG-0561 at 5. NRC guidance indicates that, before commencing a shipment by rail, the applicant “should verify with the rail carrier that a route the NRC has previously approved is still the route posing the least overall safety and security risk” and “submit a request to the NRC to amend the approved rail route if conditions warrant changes to certain segments of the route.” *Id.* at 6. Road routes should be physically inspected and re-inspected as warranted in light of changing road conditions due to significant road construction, demolition, or construction of rest areas. *Id.* at 5-6.

requirements of NEPA, which calls for “reasonable forecasting”¹⁴³ rather than a “crystal ball inquiry”¹⁴⁴ in situations involving uncertain future actions or developments.

Petitioners’ assertion that specific SNF transportation routes must be identified now so that state and local emergency responders can “comprehend the scope of this vast SNF shipping campaign” is incorrect, immaterial, and contrary to NRC regulations.¹⁴⁵ Before SNF may be shipped to the WCS CISF, the shipper must submit a route approval application to the NRC pursuant to the requirements set forth in 10 C.F.R. § 73.37 and the guidance contained in NUREG-0561. It is through that application and review process—not the ER—that coordination with local law enforcement and emergency response will occur.

Petitioners have provided no information or analysis to suggest that the identification of actual transportation routes—even assuming such identification were possible now—would materially affect the conclusions set forth in the ER with regard to transportation-related impacts. As discussed above, the Application’s analysis of the radiological impacts associated with the transport of SNF to the proposed CISF site from both operating and decommissioned sites used three representative rail routes to estimate *bounding* doses for normal transportation and potential accident conditions for proposed rail shipments to and from the WCS CISF. These calculations, which Petitioners have not challenged (or even acknowledged), show that the radiological impacts for both incident-free transportation and postulated accidents are small.

Finally, with regard to the four issues raised by Petitioners on page 43 of their Petition, ISP has provided appropriate information given the nature of the proposed action (construction and operation of the WCS CISF), the early stage of the project, and NEPA’s controlling rule of

¹⁴³ *Scientists’ Inst. For Pub. Info., Inc. v. AEC*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

¹⁴⁴ *Natural Res. Def. Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

¹⁴⁵ Petition at 43.

reason. First, as explained in ISP’s response to Proposed Contention 5, NEPA does not require detailed EJ analysis of speculative transportation routes.¹⁴⁶ Second, as discussed above, the ER describes the likely rail corridor, spur, and side track that would be used to transport SNF and GTCC waste to the proposed WCS CISF and, for purposes of transportation outside of the region (as defined in Section 72.3 and referenced in Section 72.108), identifies three representative routes. Neither NEPA nor Part 72 requires identification of “more efficient” routing alternatives, particularly at this stage of the project.¹⁴⁷ Third, the ER does describe, to the extent practicable, certain actual and anticipated infrastructure upgrades, another fact overlooked by Petitioners.¹⁴⁸ Finally, as discussed above, ER Section 4.2 contains detailed discussion of potential SNF transportation-related impacts under normal and accident conditions, including radiological and nonradiological impacts to public health. That discussion, which is not acknowledged or challenged by Petitioners, amply meets ISP’s present obligations under NEPA.

* * *

¹⁴⁶ See *infra* § IV.G.

¹⁴⁷ See NUREG-0561 at 5-6. Additionally, DOT regulations require a rail carrier transporting certain hazardous waste (encompassing SNF) to perform and maintain route analyses. 49 C.F.R. § 172.820. If DOT finds that a chosen route is not the safest and most secure practicable route available, then DOT’s Federal Railroad Administration (“FRA”) may require the use of an alternative route. 49 C.F.R. § 172.822(j); see also 49 C.F.R. § 209.501 (FRA review of rail transportation safety and security route analysis). FRA policy calls for shippers of SNF to notify the FRA with carrier and route information at least 90 days before initial shipment; states that the route section process will consider track classification to ensure the highest-rated track is utilized; and provides that the FRA will consult with the shipper, carrier and agency on route selections, inspect the track, and coordinate with the rail carrier to ensure that a rail flaw detection vehicle is operated over the entire designated rail route. See Safety Compliance Oversight Plan for Rail Transportation of High-Level Radioactive Waste and Spent Nuclear Fuel (June 1998) at 5, 7-9, Appendix B (FRA High Level Nuclear Waste Rail Transportation Inspection Policy), available at <https://www.hsd.org/?view&did=15760>.

¹⁴⁸ See ER at 3-6 (noting that some shutdown reactor sites would require upgrades to provide rail access or transport by heavy haul truck to an intermodal rail transfer facility); *id.* at 3-6, 4-10, 4-16 (noting that over the next several years, DOE is expected to commission new transportation systems needed to transport SNF from existing commercial reactor sites, including the shutdown reactor sites, to a CISF or geologic repository, based in part on studies performed by DOE in 2013 and 2014 and cited in the ER); *id.* at 3-7 (stating that the TNMR recently upgraded the rail lines (Class 1) to accommodate heavier loads expected to be transported to the WCS CISF site).

Accordingly, Proposed Contention 1 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

D. Proposed Contention 2 (Start Clean/Stay Clean) Is Inadmissible

Proposed Contention 2 states:

Interim Storage Partners states in its “Purpose and Need” statement that: “A CISF is needed to ensure that the SNF at these commercial reactor sites can be safely removed so that the remaining lands can be returned to greenfield status.” ER § 1.1, p. 1-5. But the implementation of ISP’s plan contradicts its purpose and need statement.¹⁴⁹

Petitioners argue that ISP’s “start clean/stay clean” management philosophy will lead to some number of SNF canisters not being transported to the WCS CISF, but rather stranded at on-site ISFSIs—meaning that sites will not be returned to greenfield status, which the ER identified as one objective of the project.¹⁵⁰ Central to Petitioners’ proposed contention is the notion that ISP will be “cherry picking” the best canisters for transport and storage at the WCS CISF and leaving the rest behind. As a result, Petitioners claim that ISP’s statement of purpose and need “is not reasonable, because it is unsupported by data and evidence”¹⁵¹ and “postulates an unconsidered alternative.”¹⁵²

As shown below, this entire contention is based on a creative misunderstanding of the “start clean/stay clean” management philosophy. But that philosophy is not represented anywhere in the Application as a methodology to exclude canisters for shipment to the WCS CISF. For this and other reasons, Proposed Contention 2 is inadmissible because it fails to raise a material issue, lacks supporting facts or expert opinions, and fails to demonstrate a genuine

¹⁴⁹ Petition at 49-50.

¹⁵⁰ *Id.* at 50-53.

¹⁵¹ *Id.* at 54.

¹⁵² *Id.*

dispute with the Application on a material issue of law or fact, as required by 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

1. Proposed Contention 2 Raises Unsupported and Immaterial Issues

Petitioners' proposed contention is based on the speculative claim that "compromised" or "problematic" SNF canisters exist and are spread across a number of existing on-site ISFSIs.¹⁵³ Petitioners, however, have failed to identify even a single example of such a canister, nor do they explain how such a canister could exist without violating the relevant technical specifications of the facility license. Petitioners also make a number of unsupported assumptions to construct their conclusion that ISP will reject some canisters for acceptance and leave them on current reactor sites, and thus not achieve the stated purpose and need of the project.

Simply put, this proposed contention is not admissible due to the absence of support for any of Petitioners' assumptions. A contention "will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, no substantive affidavits,' but instead only 'bare assertions and speculation.'"¹⁵⁴ Moreover, the issue raised by Petitioners is so implausible that it fails to identify a material issue in this proceeding. Indeed, the Commission previously rejected a similar contention in the *Private Fuel Storage* ("PFS") proceeding.¹⁵⁵ There, the petitioner alleged that the ER failed to address contamination from a defective canister in a hypothetical scenario wherein the canister was accidentally damaged after initial loading.¹⁵⁶ The Commission determined, however, "that accidental canister breach is not a credible scenario."¹⁵⁷ The

¹⁵³ *Id.* at 51-52.

¹⁵⁴ *Fansteel, Inc.* (Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003) (quoting *Oyster Creek*, CLI-00-6, 51 NRC at 208).

¹⁵⁵ *PFS*, CLI-04-22, 60 NRC at 136-37.

¹⁵⁶ *Id.* at 136.

¹⁵⁷ *Id.* at 136-37.

Commission also noted that reactor licensees packaging their SNF for shipment have NRC-approved Quality Assurance (“QA”) procedures that would minimize the possibility that any defective canister would arrive at the away-from-reactor ISFSI.¹⁵⁸ Here, Petitioners offer no explanation as to why the requirements for corrective action and QA procedures at reactor sites purportedly are inadequate to correct any deficiency found and, thus, why a shipment of defective canisters must be assumed, and evaluated, as a matter of law.¹⁵⁹ Petitioners also fail to show how these unsupported assumptions would make any difference in the outcome of this proceeding, or make any difference in the NRC’s decision on the Application.¹⁶⁰ Accordingly, Proposed Contention 2 is immaterial and unsupported, and should be rejected.

2. Proposed Contention 2 Fails to Demonstrate a Genuine Dispute with the Application

a. Petitioners Misconstrue the “Start Clean/Stay Clean” QA Philosophy as Used in the Application

Proposed Contention 2 also is inadmissible because Petitioners misconstrue the meaning of “start clean/stay clean,” as that phrase is used in the Application. Petitioners assert that “start clean/stay clean” describes ISP’s *acceptance standard* for SNF canisters, and that it purportedly will be used to justify leaving certain canisters at existing sites. This is not the case. “Start clean/stay clean” refers to a QA philosophy that the canisters are manufactured clean, loaded clean, and stored clean to ensure the canister surface stays free from contamination.¹⁶¹ This philosophy is not the creation of ISP, but rather is the underpinning of commercial dry storage in the United States and embedded in NRC’s regulatory requirements. This philosophy starts with

¹⁵⁸ *Id.* at 138; *see also* 10 C.F.R. § 71.101.

¹⁵⁹ A contention cannot be based on the assumption that a licensee will not comply with NRC regulations. *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-01-9, 53 NRC 232, 235 (2001).

¹⁶⁰ *Oconee*, CLI-99-11, 49 NRC at 333-34; *Indian Point*, LBP-08-13, 68 NRC at 62.

¹⁶¹ *See* Application, App. B at 5-1.

canister manufacturers and nuclear facility owners who load the canisters and extends to the storage of the canisters at on-site ISFSIs. This concept, along with the NRC regulatory requirements at Part 72, will extend to the storage of the canisters at the proposed WCS CISF.¹⁶² As stated in the Application, ISP intends to incorporate this “start clean/stay clean” philosophy to ensure that “decommissioning activities can be completed in a safe, timely and straightforward manner.”¹⁶³ Contrary to Petitioners’ assertions, ISP is not somehow using “start clean/stay clean” to justify rejecting the compromised or problematic canisters that Petitioners speculated into existence.¹⁶⁴ Ultimately, Petitioners’ misreading of the Application provides an insufficient basis for a contention.¹⁶⁵

b. *The Proposed Contention Misconstrues the Application and SAR*

Proposed Contention 2 is also inadmissible because it misconstrues ISP’s Application and SAR, and thus fails to demonstrate the existence of a genuine dispute. Nowhere in the Application or SAR does ISP even suggest that it will leave some problematic canisters at existing sites. And there is certainly nothing to infer that ISP will be “cherry picking” certain canisters for the WCS CISF.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ ISP in no way suggests that licensees charged with safe storage of SNF should not maintain robust inspection programs and remain vigilant to the possibility of conditions adverse to quality affecting their dry storage systems. Rather, ISP seeks to highlight the conclusion the Commission reached in the CSR, namely, that issues that arise related to dry storage can be addressed within existing regulatory framework. *See* NUREG-2157, App. B § B.3.3.4 (“the NRC believes that for the storage timeframes considered in the GEIS, regulatory oversight will continue in a manner consistent with NRC’s regulatory actions and oversight in place today to provide for continued safe storage of spent fuel as long as spent fuel needs to be stored”). Accordingly, the absence of supporting bases for Petitioners’ concern over orphaned damaged canisters should not be a surprise, because there is no such basis.

¹⁶⁵ *See Ga. Inst. of Tech. (Ga. Tech Research Reactor)*, LBP-95-6, 41 NRC 281, 300 (1995) (a petitioner’s imprecise reading of a document cannot be the basis for a litigable contention).

ISP’s Application states that “[t]he SNF will originate from commercial nuclear power plants across the United States. The spent nuclear fuel will be placed inside a dual purpose canister and transported to the CISF.”¹⁶⁶ As for the types of fuel the WCS CISF will accept, ISP proposed a license condition stating that it can accept “Spent nuclear fuel elements from commercial nuclear utilities . . . including those stored under a Part 50 general license or Part 72 specific licenses, and associated fuel assembly control components and associated radioactive materials related to the receipt, transfer, and storage of that spent nuclear fuel.”¹⁶⁷ Another license condition proposed by ISP would allow ISP to accept not only “intact fuel assemblies,” but also “damaged fuel assemblies, failed fuel, and fuel debris.”¹⁶⁸ In short, Petitioners’ argument that certain fuel or canisters will be rejected and stranded misconstrues the Application.

Petitioners further misconstrue the SAR by citing several sections and arguing that they show that some SNF canisters will be left behind. But this is not what those sections say. For example, Petitioners cite SAR Sections 7.2 and 11.5, which state that ISP will conduct a record review to “verify that a canister was properly fabricated, loaded, stored, and maintained,”¹⁶⁹ to mean that “some SNF and GTCC wastes will be left behind at participating reactor sites.”¹⁷⁰ Petitioners fail to explain how a record review will determine the disposition of canisters as distinguished from identifying those actions the facility licensee would need to take to ensure the package is suitable.

¹⁶⁶ Application at 3-1.

¹⁶⁷ *Id.*, Attach. A.

¹⁶⁸ *Id.*

¹⁶⁹ SAR at 7-3; *Id.* at 11-6.

¹⁷⁰ Petition at 50-51.

Petitioners also cite SAR Section 9.1.2, which deals with radiation protection and states that gaseous releases of radiation are prevented by the canister design¹⁷¹ to mean that the condition of canisters will determine whether they are transported to the WCS CISF.¹⁷² How the canisters' design to prevent gaseous releases is related to the present condition of the canisters is not explained by Petitioners. If, however, Petitioners are concerned that a canister integrity issue may preclude transportation to the WCS CISF, that issue should and can be addressed at the reactor site, by that licensee, before transport. Petitioners cite no basis whatsoever for a contrary conclusion. Petitioners' hypothetical construct of orphaned SNF lacks any basis whatsoever and is far too speculative to require additional analysis under NEPA; and it in no way demonstrates any deficiency (much less a material one) in ISP's statement of purpose and need.

In short, Proposed Contention 2 relies on an inaccurate reading of the Application and SAR. Neither the Application nor the SAR supports Petitioners' claim that ISP will be "cherry picking" canisters or abandoning canisters at existing ISFSIs.

* * *

Accordingly, Proposed Contention 2 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

E. Proposed Contention 3 (Financial Qualifications) Is Inadmissible

Proposed Contention 3 states:

ISP as a matter of fact and law has not provided reasonable assurance that it can or will obtain the necessary funds to cover the costs of construction, operation, maintenance and decommissioning of the CISF.¹⁷³

¹⁷¹ SAR at 9-5.

¹⁷² Petition at 51.

¹⁷³ *Id.* at 55.

As detailed below, Petitioners misrepresent and misunderstand ISP's demonstration of financial qualifications under 10 C.F.R. § 72.22(e). They incorrectly assume that ISP must rely upon DOE taking title to the SNF in order to provide financial assurance for decommissioning, even though the Application presents alternatives for providing financial assurance whether or not DOE takes title. Similarly, Petitioners place undue emphasis on the requested exemption, because they misunderstand that ISP is simply proposing an alternative that would be available if DOE is the customer. Petitioners then attempt to bootstrap this misunderstanding into an opportunity to challenge that ancillary exemption request in this proceeding. Finally, Petitioners introduce extraneous issues related to an SNF shipper's liability indemnification during transportation, which is unrelated to ISP's financial qualification. Accordingly, Proposed Contention 3 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

1. Petitioners Mischaracterize ISP's Demonstration of Financial Qualifications Under 10 C.F.R. § 72.22(e)

Contrary to 10 C.F.R. § 2.309(f)(1)(vi), Petitioners' arguments regarding financial qualifications misrepresent applicable portions of the Application providing alternative financial qualifications bases and fail to challenge those portions that demonstrate financial qualifications.

a. Petitioners Inaccurately Assume ISP's Reliance on DOE's Taking Title to SNF

Proposed Contention 3 misrepresents ISP's demonstration of financial qualifications. Petitioners cite exclusively to ER Section 7.3 (Costs Analysis)¹⁷⁴ and ignore Section 1.6 of the Application (Financial Qualifications and Financial Assurance). Section 1.6 provides an estimate of costs of construction, sources of funds, and a description of ISP and the resources of its participants—WCS and Orano—and provides required detail on decommissioning funding

¹⁷⁴ *Id.* at 57-58 (referencing ER §§ 7.3, 7.3.1, 7.3.2, 7.3.3).

assurance as required by 10 C.F.R. §§ 72.22(e)(1)-(3). The portions of the ER cited by Petitioners do not conflict with this information in the Application. Instead, those ER sections provide detailed analysis not only of costs required for construction and operation of the facility, but also for other costs to be evaluated in a cost-benefit analysis for NEPA purposes. Petitioners point to no material differences between the two sections of the Application.

The Application includes the possibility that DOE has or will take title to the SNF. Proposed Contention 3 states inaccurately that DOE has “no legal means” to take title. This conclusion is stated without basis or explanation. In fact, DOE has already—on multiple occasions—exercised its inherent authority to take legal title to and possession of commercial nuclear fuel from numerous commercial entities to transport and store it pending disposal.¹⁷⁵ Petitioners cite no basis for a contrary conclusion.¹⁷⁶ Accordingly, Proposed Contention 3 fails to show a genuine dispute with the Application under 10 C.F.R. § 2.309(f)(1)(vi). It also fails to make any attempt to satisfy the requirements of 10 C.F.R. §§ 2.309(f)(1)(iii)-(v).

b. *Petitioners Misrepresent ISP’s Basis for Financial Qualifications in the Event DOE Is a Customer*

As noted above, Petitioners chose to ignore the bases for financial qualifications provided in Section 1.6 of the Application. Section 1.6 references an exemption identified in Section 1.7 for use of an alternative to the financial assurance requirements *if* DOE is the customer. The

¹⁷⁵ See U.S. Nuclear Waste Technical Review Board, Management and Disposal of U.S. Department of Energy Spent Nuclear Fuel (December 2017) at § 2.1, Table A1-1, *available at* <https://www.nwtrb.gov/docs/default-source/reports/nwtrb-mngmntanddisposal-dec2017-508a.pdf?sfvrsn=12>.

¹⁷⁶ Although not raised by Petitioners, the Commission already has decided that § 10155(h) of the NWA did not abrogate previous authority granted under the AEA. See *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-02-29, 55 NRC 390, 401 (2002); Cf. *Bullcreek v. NRC*, 359 F.3d 536, 539 (D.C. Cir. 2004). Regardless, as shown in ISP’s response to various other NWA issues raised in this proceeding, whether DOE currently has authority to use the CISF or chooses to use it is irrelevant to NRC’s licensing authority. See, e.g., ISP Answer to BN Hearing Request at 32-34.

language of the exemption request in Application Section 1.7 referenced by Petitioners demonstrates that ISP is presenting the exemption as an alternative, and having DOE as a customer is not necessary to establish the financial qualifications for ISP.¹⁷⁷ Petitioners quote portions of the exemption request in Application Section 1.7.1, which describes the following two options:

First:

ISP is seeking a contract with the DOE that shall guarantee decommissioning funds will be provided for use by ISP. This contract shall require the DOE to pay the actual costs of decommissioning the facilities, equipment, storage systems, and land used to store the material at the CISF.

Second:

In the event that the DOE does not enter into a contract to specifically guarantee that the funds shall be available for use by ISP to decommission said facilities, equipment, and land, then ISP shall have one of the financial assurance instruments, specified in 10 CFR 72.30(e), as specifically approved by the NRC, prior to receipt of SNF at the CISF, as a condition of the license. Proposed license conditions are provided in Attachment A of this License Application.

Thus, ISP clearly states that it intends to meet NRC's financial qualifications requirements at 10 C.F.R. § 72.22(e) *with or without* the requested exemption to the decommissioning specific requirements of 10 C.F.R. § 72.30(e). Proposed Contention 3 is founded on the false assumption that approval of the exemption is *required* for demonstration of ISP's financial qualifications. The proposed contention continues at some length with unsupported speculation about whether ISP or its participants would be willing to pre-pay or

¹⁷⁷ Petition at 60.

provide a parent company guarantee; but this is all conjecture, without any factual or expert support. Yet the proposed contention fails to posit a problem with the most obvious alternative at 10 C.F.R. § 72.30(e)(3), under which payments from customers would be made to an external sinking fund and combined with a surety bond. The Application states exactly this:

Alternatively, ISP may use a surety bond combined with a conformity external sinking fund as authorized by 10 CFR 72.30(e)(3). Payments from storage operations would be deposited into the external sinking fund as waste is received. A surety bond would be used to assure the difference in the decommissioning cost estimate and the value of the sinking fund until the sinking fund is fully funded by DOE or the other SNF Title Holders(s).¹⁷⁸

Petitioners fail to demonstrate why these other alternatives are not available to ISP.

Accordingly, the proposed contention fails to satisfy 10 C.F.R. §§ 2.309(f)(1)(ii), (iv), or (v).

Petitioners also misunderstand the nature of NRC's decommissioning funding assurance requirements at 10 C.F.R. § 72.30(e) (which are similar to decommissioning funding assurance alternatives at 10 C.F.R. § 50.75(e)(1) and at 10 C.F.R. § 70.25(f)). In each case, the regulation provides available alternative methods of assurance, each of which the NRC already has concluded is acceptable. Petitioners appear to object to the optionality provided in NRC's regulations or the ability of licensees to change the method following initial licensing.¹⁷⁹ This is an impermissible challenge, pursuant to 10 C.F.R. § 2.335, to the NRC's regulations, which codify such flexibility. In full compliance with NRC's regulations, the Application demonstrates one acceptable method of assurance and requests an exemption to provide another. Petitioners fail to present an admissible challenge to either as required by 10 C.F.R. §§ 2.309(f)(1)(iii) or (vi).

¹⁷⁸ Application at 1-7.

¹⁷⁹ Petition at 61.

2. Petitioners' Challenge to the Proposed Exemption for an Alternate Demonstration of Decommissioning Funding Assurance Also Must Be Rejected

Proposed Contention 3 also seeks to challenge the exemption request, but that request is ancillary to NRC approval of the Application. This challenge fails for two reasons: first, Petitioners have no legal right in this case to challenge the proposed exemption; and second, even if they had that right in this case, the challenge is not supported. Accordingly, the proposed contention must be rejected for failing to identify an issue within the scope of the proceeding, to demonstrate an issue material to a finding the Staff “must make to support the action” and to provide a factual or legal basis for the objection, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii), (iv) and (v), respectively.

The AEA provides no opportunity as of right for members of the public to challenge exemption requests generally.¹⁸⁰ “The Commission recognized an exception to this rule, however, in *Private Fuel Storage*, CLI-01-12, where it ruled a hearing on exemption-related matters was necessary insofar as ‘resolution of the exemption request directly affect[ed] the licensability of the proposed’ fuel storage site and ‘the exemption raise[d] material questions directly connected to an agency licensing action.’”¹⁸¹ Such is not the case here. As discussed above, although the requested exemption provides one means of financial assurance, a favorable determination of that request is not required for NRC to approve the Application; decommissioning funding assurance is available under 10 C.F.R. § 72.30(e)(3), whether or not the exemption is granted.

¹⁸⁰ *Entergy Nuclear Vt. Yankee & Entergy Nuclear Operations, Inc.* (Vt. Yankee Nuclear Power Station), LBP-15-18, 81 NRC 793, 797 & n.3 (2015).

¹⁸¹ *Id.* at 797 (quoting *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459, 467 (2001)).

The Commission’s recent decision in *Vermont Yankee*,¹⁸² which provides further guidance on the narrow exception explained in CLI-01-12, compels the same conclusion. In CLI-16-12, the Commission held that a challenge to an exemption request (which does not otherwise entail hearing rights) may be considered in the adjudicatory proceeding for another licensing action to which hearing rights attach if approval of the exemption is a legal prerequisite to approval of the other licensing action.¹⁸³ The Commission noted that, not merely related to the same *topic*, the two licensing actions in that case were “inextricably intertwined.”¹⁸⁴ The Commission explained it did not intend to abandon Congress’ intentional exclusion of exemption requests from hearing opportunities and indicated the “determination is entirely dependent upon the circumstances of each case.”¹⁸⁵ Here, the Application presents a compliant basis for financial qualifications regardless of whether the exemption is granted, and thus cannot possibly satisfy the “inextricably intertwined” standard. Accordingly, the first prong of the Commission’s limited exception to the general rule is not satisfied in this case, and that portion of Proposed Contention 3 must be rejected as beyond the scope of this proceeding.

Further, even were the Board not required to reject the exemption challenge, Proposed Contention 3 is not supported by fact or legal authority and thus provides no basis to challenge the requested exemption, contrary to 10 C.F.R. § 2.309(f)(1)(v). In CLI-16-12, the Commission noted that even under that narrow set of circumstances where a hearing opportunity may be

¹⁸² *Entergy Nuclear Vt. Yankee LLC & Entergy Nuclear Operations, Inc. (Vt. Yankee Nuclear Power Station)*, CLI-16-12, 83 NRC 542, 551-52 (2016).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 553.

¹⁸⁵ *Id.*

appropriate on an essential exemption request, all six requirements of 10 C.F.R. § 2.309(f)(1) still must be satisfied.¹⁸⁶ Here, they are not.

Petitioners provide a lengthy discussion of what they would have the Staff apply as standards in considering the exemption request, but then provide absolutely no explanation whatsoever as to how the Application and exemption request fail to meet those standards.¹⁸⁷ Petitioners provide a single conclusory sentence: “ISP’s proposed financial arrangements are merely wishful; they are not lawful.”¹⁸⁸ This single sentence cannot support a contention. Petitioners provide no basis—factual or legal—for either assumption.

It is irrelevant that Petitioners may anticipate a future legal challenge to DOE’s authority to take title to SNF or to contract with ISP for storage services or otherwise, because this in no way erodes the existing Commission or judicial determinations regarding the effect of the NWPA on pre-existing AEA authority.¹⁸⁹ To conclude otherwise would elevate threatened challenges over existing law. In the face of these determinations, the burden is on Petitioners to demonstrate how the requested exemption is *prohibited* by law. This they have not even attempted in Proposed Contention 3. Accordingly, it must be rejected under 10 C.F.R. § 2.309(f)(1)(v).

¹⁸⁶ And on that basis, the Commission rejected Vermont’s demand.

¹⁸⁷ Petition at 62-64.

¹⁸⁸ *Id.* at 64.

¹⁸⁹ *See generally* Interim Storage Partners’ Answer Opposing Hearing Request and Petition to Intervene Filed by Sierra Club § IV.B (Dec. 10, 2018).

3. Petitioners' Arguments Regarding Price-Anderson and Transportation Are Irrelevant to Financial Qualifications and Cannot Support a Contention

Petitioners argue that because of ISP's project structure, Price-Anderson indemnification is not available during transportation of SNF from reactor sites to the WCS CISF.¹⁹⁰ Petitioners misunderstand Price-Anderson arrangements under the scenarios of both private and DOE transport. Petitioners also fail to establish any relevance of this topic to financial qualifications under 10 C.F.R. §§ 72.22 or 72.30(e).

Petitioners provide no basis for their conclusion that Price-Anderson coverage is not available. The facts are contrary to this conclusion. In the case of transport by private SNF Title Holders of their material to the WCS CISF, their existing Facility Forms provide coverage for any "insured shipment."¹⁹¹ Similarly, if DOE holds title to the SNF and is contracting shipment to the WCS CISF, indemnity is authorized under Section 170d of the AEA, and DOE's policy and practice is to provide its contractors with a "Nuclear Hazards Indemnity," which includes coverage for transportation activities.¹⁹² More importantly, Petitioners provide no explanation of how the availability of insurance coverage for transportation by ISP's customers to the WCS CISF site is in any way relevant to ISP's ability to construct, operate or decommission the facility under 10 C.F.R. §§ 72.22(e)(1)-(3); as noted above, transportation is beyond the scope of the requested licensing action. Ultimately, these conclusory assertions fail to raise an admissible issue.

* * *

¹⁹⁰ Petition at 58.

¹⁹¹ 10 C.F.R. § 140.91, App. A § I (Coverage A) (coverage for damage caused "by the nuclear energy hazard," which is defined to include an "insured shipment").

¹⁹² *See also* 48 C.F.R. §§ 952.250-70(d)(2)(i), Nuclear Hazards Indemnity Agreement.

Accordingly, Proposed Contention 3 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

F. Proposed Contention 4 (LLRW Volume) Is Inadmissible

Proposed Contention 4 states:

The ISP Environmental Report significantly underestimates the volume of low-level radioactive waste (“LLRW”) that will be generated by the interim storage project. ISP fails to count irradiated concrete and other materials toward the gross total volumes of LLRW. ISP further fails to acknowledge and properly quantify LLRW volumes resulting from mandatory repackaging of SNF and GTCC waste, at least some of which will occur at the WCS site to meet likely DOE requirements for transportation, aging and disposal (“TAD”) canisters to be delivered to the final geological repository. ISP provides an incomplete perspective of the waste management obligations at the CISF as well as the financial burdens arising from creation, oversight and disposition of thousands of additional tons of LLRW. This truncated perspective in turn has caused a seriously inaccurate picture of the true costs of constructing, operating and decommissioning the WCS CISF.¹⁹³

In short, Petitioners argue that the ER fails to accurately estimate the amount of LLRW that will be generated during operation of the WCS CISF and, as a result, underestimates its true costs. In particular, Petitioners’ main reason for this underestimate is their argument that ISP will be required to repackage the SNF stored *at the WCS CISF* into different canisters for disposal at a repository.¹⁹⁴ Petitioners assert that “the canisters from which the SNF was removed instantly become low-level radioactive waste.”¹⁹⁵ Further, Petitioners assert that the concrete used for both storage pads and overpacks, as well as “subgrade materials that will be

¹⁹³ Petition at 64.

¹⁹⁴ *Id.* at 66.

¹⁹⁵ *Id.* at 68-69.

bombarded for 60 to 100 years will largely, if not entirely become LLRW, due to radioactive activation.”¹⁹⁶

Proposed Contention 4 is inadmissible for multiple reasons. First, Petitioners’ allegation that the ER is required to consider the impacts of repackaging SNF is an impermissible challenge to the NRC’s Continued Storage Rule, 10 C.F.R. § 51.23 (“CSR”). Second, ISP has no plans to conduct repackaging at the facility, or even to conduct any handling of bare fuel at all, and Petitioners fail to provide adequate support for their position that ISP will somehow be *required* to do so. Finally, Petitioners provide no support for their claim that all or nearly all of the CISF pad and overpack concrete and subgrade materials will become LLRW requiring disposal. Proposed Contention 4 thus should be dismissed as outside the scope of this proceeding, immaterial, unsupported, and for failure to raise a genuine dispute with the Application.

1. The Application and ER Fully Comply with NRC Regulations and Guidance in Discussing the Amount of LLRW that Will Be Created by Construction and Operation of the WCS CISF

ISP submitted its Application pursuant to 10 C.F.R. Part 72, “Licensing Requirements for the Independent *Storage* of Spent Nuclear Fuel, High-Level Radioactive Waste, and Reactor-Related Greater Than Class C Waste” (emphasis added). As such, ISP is seeking a license to construct and operate a storage facility for a term of 40 years.¹⁹⁷ Pursuant to its Application, “ISP will use multipurpose canisters in both the shipping casks and storage casks. No handling of bare spent nuclear fuel will occur at the CISF since operations will be restricted to handling of sealed canisters.”¹⁹⁸ Further, ISP plans to conduct operations that will include the following activities: shipping cask receipt, inspection, and unloading; canister transfer between shipping

¹⁹⁶ *Id.* at 73.

¹⁹⁷ Application at 1-5.

¹⁹⁸ *Id.* at 1-2.

cask and storage cask; movement of storage cask between Cask Handling Building and Storage Area; assembly of storage cask instrumentation; preparation and release of shipping cask for off-site transport; and periodic monitoring of storage casks.¹⁹⁹ Accordingly, ISP is *not* seeking a license to repackage SNF prior to transportation to a permanent repository.

Pursuant to 10 C.F.R. § 72.34, ISP must submit an ER that complies with 10 C.F.R. § 51.61, which in turn requires that the ER meet the requirements of 10 C.F.R. § 51.45(b)(1). Therefore, the ER is required to provide a description of the impact of the proposed action, *i.e.*, the construction and operation of the WCS CISF, on the environment during the initial 40-year term, as well as a description of any adverse environmental effects which cannot be avoided. NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, provides guidance to the NRC Staff in reviewing applications for construction of ISFSIs, as well as guidance to applicants on the format and technical content of an ER.²⁰⁰ With respect to the issues raised in Proposed Contention 4, NUREG-1748, Section 6.3.12, requires a description of the waste generation rates and sources, including waste systems, disposal activities, and sources of solid waste, while Section 6.4.13 requires a description of the impacts from these waste-related activities.

The ER fully complies with these obligations. For example, ER Section 3.12.1.3.1, Solid Low-Level Radioactive Waste, explains that:

Solid radioactive wastes may be generated at the CISF as a result of cask contamination surveillance and decontamination activities. These wastes generally consist of paper or cloth swipes, paper towels, protective clothing, and other job control wastes contaminated with low levels of radioactivity. Expended HEPA filters from the transfer facility ventilation system along with job

¹⁹⁹ *Id.* at 5-1.

²⁰⁰ NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs; Final Report at 6-1 to 6-35 (Aug. 2003) (ML032450279).

control waste associated with filter change-out, also may contribute to the generation of solid radioactive waste.

Similarly, ER Section 4.3, Geology and Soils Impacts, explains that the “CISF would be designed and constructed in a manner that would minimize the quantity of radioactive wastes and contaminated equipment, and facilitate the removal of radioactive wastes and contaminated materials at the time the CISF is permanently decommissioned.” ER Section 4.13.3 further discusses the impacts from solid LLRW, and explains that “[o]nly very small quantities of solid LLRW are expected to be generated at the CISF. Solid waste containing low levels of radioactivity would be generated as a result of the decontamination or removal of residual contamination that may potentially be present on transportation casks received at the Transfer Building.”

In addition, the Application specifically considers the potential for LLRW to be generated in concrete at the WCS CISF. Specifically, ISP’s Preliminary Decommissioning Plan, included as Appendix B to the Application, states that “radiological activation of storage modules and pad materials is expected to be insignificant with radiation levels below the applicable NRC criteria for unrestricted release.”²⁰¹ It further states:

Once all of the spent nuclear fuel canisters stored at the WCS CISF have been shipped off-site and the decommissioning period begins, characterization surveys will be performed to verify that the storage modules and the storage pads are free of contamination. *It is anticipated that the storage modules and pads will not be contaminated and will be left in place or removed as determined by ISP.* In the unlikely event the characterization surveys identify contamination levels above the NRC limits for unrestricted release, conventional decontamination techniques will be used which minimize the volume of waste. Any waste generated will be sent to a licensed facility for disposal.²⁰²

²⁰¹ Application, App. B, Preliminary Decommissioning Plan at 2-1.

²⁰² *Id.* at 2-2 (emphasis added).

Further, Appendix D, Decommissioning Funding Plan, to the Application includes assumptions regarding generation of LLRW. Section 3.1.3 of Appendix D states that “only sealed canisters (welded) will be accepted for storage. The facility does not open the canisters at any time.” Nevertheless, the decommissioning cost estimate conservatively assumes that certain areas and components will require decontamination, including the following:

Storage Modules: The storage module vendors have indicated that contamination is not anticipated from the stored waste. Contamination controls mentioned above minimize the possibility that storage modules will have radioactive contamination above the specified release limits established by the NRC. For purposes of the cost estimate, ISP has assumed that parts of some of the storage modules will require decontamination. . . The cost estimate assumes that the maximum portion of a storage module that would require decontamination is 20%. Decontamination activities would include scabbling contaminated concrete or bead-blasting steel. Waste generated (scabbled concrete, steel scale, misc. tools and filters, and PPE) will be packed into drums for transportation by truck to the adjacent Waste Control Specialists LAW disposal cell.

Storage Pads: The storage pads will be used to support the storage modules. It is not anticipated that these concrete pads will become contaminated due to the canister controls. ISP has assumed that 20% of the storage pad areas have levels of contamination above allowable release limits. The total storage pad area is 125,000 square feet, 25,000 square feet of this area is assumed to be contaminated. Decontamination activities would include scabbling of concrete. Waste generated will be packed into drums for transportation by truck to the adjacent Waste Control Specialists LAW disposal cell.²⁰³

Appendix D also notes that the Decommissioning Cost Estimate will be updated (at a minimum) every three years, which ensures that experience operating the WCS CISF will provide additional input and verification of key assumptions.²⁰⁴

²⁰³ *Id.* at 3-4 to 3-5.

²⁰⁴ *Id.* at 3-5.

In short, the ISP ER and Application fully consider the potential that construction and operation of the WCS CISF will generate a small amount of LLRW, but also conservatively assume that certain areas and components will require decontamination.

2. Proposed Contention 4 Is an Impermissible Challenge to the CSR

Proposed Contention 4 acknowledges that the ER discusses LLRW environmental impacts during construction and operation of the WCS CISF.²⁰⁵ Nevertheless, Petitioners allege that the ER must consider the environmental impacts from substantial additional LLRW generated during repackaging of SNF and replacement of the WCS CISF concrete pads and concrete overpacks.²⁰⁶ But ISP is not seeking, during the term of its license, to conduct repackaging at the WCS CISF.²⁰⁷ And the pads and storage overpacks are not expected to become activated during the limited term of the license.²⁰⁸ Thus, Proposed Contention 4 must be read to assert that the ER is deficient because it failed, contrary to some unspecified requirement, to consider environmental impacts from the storage of SNF after the end of the licensed life of the WCS CISF.

However, such an assertion fails to identify a material deficiency because the Commission “has generically determined that the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation . . . are those impacts identified in NUREG-2157,”²⁰⁹ *i.e.*, the CSR Generic Environmental Impact Statement (“CSR GEIS”), which

²⁰⁵ Petition at 65-66.

²⁰⁶ *Id.* at 64, 72-73.

²⁰⁷ *See* Application at 1-2 (“No handling of bare spent nuclear fuel will occur at the CISF since operations will be restricted to handling of sealed canisters.”).

²⁰⁸ Application, App. B, Preliminary Decommissioning Plan at 2-1.

²⁰⁹ 10 C.F.R. § 51.23(a).

is codified in the CSR.²¹⁰ The CSR GEIS assumes that SNF canisters and casks, as well as the concrete pads of an ISFSI, may have to be replaced approximately once every 100 years, which is well beyond the proposed term of the WCS CISF license.²¹¹

Specifically, CSR GEIS Section 5.15, Waste Management, includes a discussion of the potential environmental waste management impacts from the continued storage of SNF at an away-from-reactor ISFSI, such as the WCS CISF, and concludes that the impacts from LLRW generated at the site will only be “minor,” even though, in the long-term storage timeframe, the canisters and pads may need to be replaced.²¹² Ultimately, the CSR GEIS concludes that “the total volume of LL[R]W generated during the long-term timeframe from replacement of canisters and decontamination of casks, ISFSI pads, [dry transfer systems], and canister transfer building is about 6,800 m³ (8,900 yd³), which is comparable to the LL[R]W volumes estimated for decommissioning a pressurized-water reactor.”²¹³ Thus, the issue raised by Petitioners already has been generically considered and addressed by the CSR, which cannot be challenged in this proceeding.

Petitioners acknowledge that the CSR GEIS calculates that a certain amount of LLRW would be generated during SNF repackaging operations and replacement of concrete pads.²¹⁴ However, they complain that these volumes are too low.²¹⁵ But because the findings in the CSR GEIS (including the LLRW calculations) have been codified in the CSR, Petitioners’ challenge

²¹⁰ See generally NUREG-2157.

²¹¹ *Id.* § 1.8.3.

²¹² *Id.* § 5.15.2.

²¹³ *Id.*

²¹⁴ Petition at 73. Petitioners, however, cite to Chapter 4 of the CSR GEIS, which discusses the impacts from continued storage in an ISFSI at a reactor site, rather than Chapter 5, which discusses the impacts from an away-from reactor ISFSI.

²¹⁵ Petition at 73-74.

impermissibly attacks NRC regulations, contrary to 10 C.F.R. § 2.335. Accordingly, Proposed Contention 4 is outside the scope of this proceeding.

3. Proposed Contention 4 Should Also Be Rejected as Immaterial, Unsupported, and for Failure to Raise a Genuine Dispute with the ER

Petitioners raise two additional concerns relating to LLRW volumes and the alleged failure of the ER. First, Proposed Contention 4 asserts that ISP will be *required* to repackage fuel into new storage systems to allow for disposal in a repository, and the ER failed to consider the environmental impacts from such allegedly-required repackaging.²¹⁶ Second, Petitioners allege that the concrete and subgrade materials at the WCS CISF will become activated during the 60-100 years that it will be in operation, and the ER must consider these impacts as well.²¹⁷ Both of these concerns should be rejected as immaterial, unsupported, and for failure to raise a genuine dispute.

a. Repackaging

Petitioners claim that DOE “will require most casks slated for disposal to be repackaged either at the reactor sites or at the CISFs.”²¹⁸ Petitioners further allege, without support, that ISP would have “responsibility for this repackaging.”²¹⁹ This despite the fact that Petitioners acknowledge ISP does not plan to conduct repackaging: “WCS has not included a repackaging capability in its license application.”²²⁰

²¹⁶ *Id.* at 66-71.

²¹⁷ *Id.* at 72-74.

²¹⁸ *Id.* at 68.

²¹⁹ *Id.* at 66.

²²⁰ *Id.* at 70 (citing Alvarez Report at 6-7).

Petitioners are correct—ISP does not plan to, nor is it seeking approval to, conduct repackaging.²²¹ Rather, the Application is to store SNF and GTCC waste at the WCS CISF for a term of 40 years.²²² Nevertheless, Petitioners assert that there will be “mandatory repackaging . . . at least some of which will occur at the WCS site to meet likely DOE requirements for transportation, aging, and disposal (“TAD”) canisters to be delivered to the final geological repository.”²²³ In essence, Petitioners conclude that, because SNF will not be stored in such (hypothetical) TAD canisters at the WCS CISF, ISP will be required to transfer the SNF into such canisters prior to shipment to a final geologic repository.²²⁴ But Petitioners provide inadequate support for their unfounded theory.

As an initial matter, Petitioners’ assertions regarding some hypothetical future repackaging mandate (and other postulated requirements of a future repository) amount to no more than gross speculation. Petitioners cite to no legal or regulatory requirements regarding the alleged mandatory repackaging *by ISP, at the WCS CISF*. Instead, Petitioners simply *assume* that fuel will have to be repackaged prior to being placed in a repository,²²⁵ and then *speculate* that the responsibility to conduct this repackaging will be borne by ISP.²²⁶ But Mr. Alvarez, after discussing the purported need to repackage SNF for disposal, neither asserts that, nor offers a reasoned explanation as to why, *ISP* would have any legal obligation to perform the

²²¹ See Application at 1-2 (“No handling of bare spent nuclear fuel will occur at the CISF since operations will be restricted to handling of sealed canisters.”).

²²² *Id.* at 1-5.

²²³ Petition at 64.

²²⁴ *See, e.g., id.* at 66.

²²⁵ *Id.* at 69-71; *see also* Alvarez Report at 7 (“[C]asks and canisters being used by the power utilities will be at least partially, and maybe largely, incompatible with future transport and repository requirements, meaning that some if not all, of the [used nuclear fuel] that is moved to dry storage by the utilities will ultimately need to be repackaged.” (quotations and citations omitted)).

²²⁶ Petition at 66.

repackaging. Nor could he. And Petitioners cite to no legal authority that would require ISP to conduct such repackaging. In fact, their discussion of the proposed contention offers a block quote that directly contradicts this assertion. Specifically, the Yucca Mountain Final Supplemental EIS, upon which Petitioners extensively rely, contemplates that “DOE would repackage commercial spent nuclear fuel that arrived in packages *other* than TAD canisters,” such as those stored at the WCS CISF, “*at the repository.*”²²⁷ Thus, Proposed Contention 4 should be rejected as unsupported.²²⁸ Moreover, their unsupported allegations are immaterial to the Application and inadmissible pursuant to 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

Further, Petitioners’ repackaging concerns explicitly relate to the transportation and permanent emplacement of SNF at a *geologic repository*, not a CISF. For example, as noted above, Proposed Contention 4 cites extensively to the EIS for the Yucca Mountain *geologic repository*.²²⁹ They also extensively quote dated DOE statements of its expectations regarding transportation to, and emplacement at, that *repository*.²³⁰ And Petitioners further cite to the testimony of Mr. Alvarez, who discusses the need for, and potential costs of, repackaging to allow for disposal of SNF at a *geologic repository*.²³¹ But Petitioners’ concerns relating to a *repository*, which are governed by separate regulatory provisions under 10 C.F.R. Parts 60 and 63, are irrelevant to, and beyond the scope of, this limited licensing proceeding, which involves

²²⁷ *Id.* at 68 (quoting U.S. Dep’t of Energy, 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, Vol. 1 at 1-14 (June 2008), *available at* <https://www.energy.gov/sites/prod/files/EIS-0250-S1-FEIS-01-2008.pdf>) (emphasis added).

²²⁸ Moreover, the title holder of the SNF stored at the CISF will retain the obligation to provide for the shipment of the fuel to DOE for disposal. *See* SAR § 3.5 (“The loaded canisters will be shipped to a Department of Energy (DOE) facility when DOE is ready to take the fuel or as directed by the holders of the title to SNF . . .”).

²²⁹ Petition at 67.

²³⁰ *Id.* at 66-68.

²³¹ *Id.* at 69-70 (citing Alvarez Report 6-7).

temporary storage at a CISF under 10 C.F.R. Part 72. Accordingly, Petitioners fail to identify an admissible issue, contrary to the requirements of 10 C.F.R. §§ 2.309(f)(1)(iii)-(iv).

b. Activation of Concrete and Subgrade Materials

Proposed Contention 4 also asserts that “WCS omitted mention of disposal of radioactively activated and radioactively contaminated concrete.”²³² But Petitioners have not provided facts or expert testimony to support their broad assertion that “[m]illions more tons of LLRW will be produced by operations of the CISF than is disclosed.”²³³ Although Petitioners do not clearly state their assumption that *all* of the concrete at the WCS CISF will be contaminated, Proposed Contention 4 uses basic arithmetic to determine that its pads will contain 104,432 cubic meters of concrete.²³⁴ Petitioners then compare this amount of concrete to the total amount of LLRW that the CSR GEIS estimates will be generated by away-from-reactor SNF storage during the long-term timeframe, which is far less than the 104,432 cubic meters estimated by Petitioners.²³⁵ Thus, Petitioners apparently assume—contrary to the CSR GEIS—that *all* of the concrete in the WCS CISF pads will become LLRW at the end of the license term.

But Petitioners have failed to provide any alleged facts or expert opinion to explain how every cubic meter of the WCS CISF concrete—pads, overpacks, even ramps—will somehow become activated during the proposed term of the license, contrary to the assumptions in the Application and CSR GEIS. Supposed mechanisms for activation of concrete are not explained

²³² *Id.* at 72.

²³³ *Id.*

²³⁴ *Id.* at 73. Petitioners also note that ISP plans to use additional concrete to fabricate and install overpacks at the WCS CISF. *Id.*

²³⁵ *Id.*

in Mr. Alvarez’s report. Thus, his conclusory assertions fail to provide the required level of support for an admissible contention.²³⁶

As Petitioners’ assumptions regarding the volume of LLRW generated by the WCS CISF are unsupported, so are their generally confusing statements regarding “an acceptable life cycle estimate of LLRW volumes and expense.”²³⁷ As an initial matter, the basis for Petitioners’ reference to Executive Order 13123, “Greening the Government Through Efficient Energy Management”—and its purported relationship, if any, to this NRC licensing proceeding—is unclear.²³⁸ Further, Petitioners’ speculation regarding the costs to repackage SNF and the purported need to consider the government’s financial liability for such efforts²³⁹ are irrelevant to, and beyond the scope of, this proceeding for the numerous reasons discussed above.

Moreover, Petitioners fail to acknowledge that Appendix B to the Application, the Preliminary Decommissioning Plan, concludes that “[r]adiological activation of storage modules and pad materials is expected to be insignificant with radiation levels below the applicable NRC criteria for unrestricted release.”²⁴⁰ Petitioners also fail to acknowledge that Appendix D to the Application, the Decommissioning Funding Plan, conservatively assumes that 20 percent of both the storage modules and the CISF storage pads will have levels of contamination above allowable release limits and need to be decontaminated.²⁴¹ Petitioners “must read the pertinent portions of the license application[,] . . . state the applicant’s position,” and explain why they

²³⁶ *Fansteel*, CLI-03-13, 58 NRC at 204.

²³⁷ *See* Petition at 74-76.

²³⁸ *Id.* at 74-75.

²³⁹ *Id.* at 76.

²⁴⁰ Application, App. B, Preliminary Decommissioning Plan at 2-1.

²⁴¹ Application, App. D, Decommissioning Funding Plan at 3-4 to 3-5.

disagree with the applicant.²⁴² Because Petitioners have failed to provide support for their assertions, or even acknowledge (much less dispute) significant, relevant, contrary information in the Application, Proposed Contention 4 is inadmissible.

* * *

Accordingly, Proposed Contention 4 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

G. Proposed Contention 5 (Environmental Justice) Is Inadmissible

Proposed Contention 5 states:

ISP states in its License Application (ML 18206A483) that “Transportation of the spent nuclear fuel shipping casks from the originating commercial nuclear reactor to the CISF will be performed in accordance with 10 CFR 71 and the originating reactor licenses *and is not part of this License Application.*” *Id.* § 1.1, p. 1-3 (Emphasis added). With that, WCS severed – and “segmented” – the transportation part of the CISF proposal from the storage component. Segmentation is impermissible for legal as well as practical reasons. One consequence of the segmentation is that Environmental Justice (“EJ”) compliance in the form of identification and analysis of potentially affected populations along the anticipated rail, truck and barge routes will be improperly excluded from disclosure in the NEPA document.²⁴³

In Proposed Contention 5, Petitioners assert that the ER must include a detailed EJ analysis for innumerable hypothetical transportation routes from every reactor in the United States to the WCS CISF.²⁴⁴ Further, Petitioners assert that EJ considerations must be taken into account in the *selection* of transportation routes.²⁴⁵ However, transportation routing decisions

²⁴² *Millstone*, CLI-01-24, 54 NRC at 358 (quoting Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170).

²⁴³ Petition at 76-77.

²⁴⁴ *See, e.g., id.* at 87 (criticizing the ER for failing to “identify and evaluate *all routes* through an Environmental Justice lens” (emphasis added)).

²⁴⁵ *See, e.g., id.* (demanding consideration of “alternate routes through major urban zones,” “evacuation preparations,” and “time-of-day and traffic aspects” in making ultimate routing decisions).

simply are *not at issue in this proceeding*.²⁴⁶ Thus, the EJ analysis Petitioners demand would not meaningfully inform agency decisionmaking here.

Moreover, conspicuously absent from Proposed Contention 5 is mention of any controlling legal authority requiring the analysis they demand. Nor is there any. The NRC has voluntarily elected to “endeavor to carry out the measures set forth” in Executive Order 12,898, regarding EJ,²⁴⁷ but only to the “extent required by NEPA.”²⁴⁸ However, decades of NEPA case law, informed by its fundamental “rule of reason” limitation, support the conclusion that detailed EJ analysis of speculative transportation routes that will not be selected until many years in the future—through separate efforts initiated by entities other than ISP—is not required in this proceeding. Accordingly, Petitioners’ unsupported arguments are immaterial, beyond the scope of this proceeding, and fail to demonstrate a genuine dispute with the Application on a material issue of law or fact, and should be rejected as contrary to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

1. NEPA Does Not Require Detailed Analysis of Speculative Transportation Routes

The seminal federal court case on alleged segmentation of transportation impacts under NEPA is *County of Suffolk v. Secretary of the Interior*.²⁴⁹ In that case, the agency prepared an EIS related to offshore oil leases.²⁵⁰ The EIS acknowledged that a future phase of the project may entail transportation of oil; thus, the agency evaluated generic transportation impacts.²⁵¹

²⁴⁶ ISP addresses Petitioners’ allegations regarding improper segmentation of transportation issues in response to Proposed Contention 1. *See supra* § IV.C.

²⁴⁷ Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations, Exec. Order No. 12,898 § 1-101, 59 Fed. Reg. 7629 (Feb. 16, 1994).

²⁴⁸ Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions; Final Policy Statement, 69 Fed. Reg. 52,040, 52,041, 52,043 (Aug. 24, 2004); *see also id* at 52,048 (“Contentions must be made in the NEPA context, must focus on compliance with NEPA, and must be adequately supported as required by 10 CFR Part 2 to be admitted for litigation”).

²⁴⁹ 562 F.2d 1368 (2d Cir. 1979).

²⁵⁰ *Id.* at 1377.

²⁵¹ *Id.*

However, the agency declined to provide “more specific consideration of and commitment to routes and modes of transportation” until specific points of transportation origin and the quantity and quality of oil to be transported were identified with specificity.²⁵² The agency noted that routing decisions were “at least three years down the road,”²⁵³ and that a separate application and approval process was required before transportation could begin.²⁵⁴ In holding that the EIS satisfied NEPA’s “rule of reason,” the court considered two factors:

- “whether obtaining more detailed useful information on the topic of transportation is ‘meaningfully possible’ at the time when the EIS for an earlier stage is prepared”,²⁵⁵ and
- “how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project.”²⁵⁶

As the court explained, “[i]f the additional information would at best amount to speculation as to future event or events, it obviously would not be of much use as input in deciding whether to proceed.”²⁵⁷ The court further noted:

although it was possible to project hypothetical [transportation] routes from various parts of the enormous [50-mile by 50-mile] area . . . it is clear that such a procedure would not yield information of practical use to the Secretary for the purpose of determining what . . . environmental problems would be encountered. In effect the procedure would amount to a meaningless exercise.²⁵⁸

²⁵² *Id.* at 1377.

²⁵³ *Id.* at 1376.

²⁵⁴ *Id.* at 1377.

²⁵⁵ *Id.* at 1378 (citing *Morton*, 458 F.2d at 837).

²⁵⁶ *Id.* (citing *Natural Res. Def. Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975)).

²⁵⁷ *Id.* “NEPA does not require a ‘crystal ball’ inquiry An EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible.” *Id.* (quoting *Callaway*, 524 F.2d at 88, in turn citing *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973)).

²⁵⁸ *Suffolk*, 562 F.2d at 1368.

The court also explained that, if the proposed action includes transportation routing decisions that “cannot be modified or changed, it may be essential to obtain such information as is available, speculative or not, for whatever it may be worth.”²⁵⁹ On the other hand, the court explained, the absence of detailed analysis does not violate NEPA’s “rule of reason”:

where a multistage project can be modified or changed in the future to minimize or eliminate environmental hazards disclosed as the result of information that will not become available until the future, and the Government reserves the power to make such a modification or change after the information is available Indeed, in considering a project of such flexibility, it might be both unwise and unfair *not* to postpone the decision regarding the next stage until more accurate data is at hand.²⁶⁰

In summary, the court noted that “[t]here comes a point when the chain of ‘ifs’ gets too long and too tenuous to be of any practical use.”²⁶¹ As explained below, that is precisely the case with the analysis Petitioners demand in Proposed Contention 5. Thus, it must be rejected for the same reasons.

2. ISP’s ER for Its Application to Construct and Operate a CISF Is Not Required to Provide Detailed EJ Analysis of Hypothetical Transportation Routes

The relevant facts in the *Suffolk* case square well with the facts at issue here. ISP’s Application seeks a specific-license for a CISF under 10 C.F.R. Part 72, but does not request approval of any transportation routes.²⁶² Nevertheless, ISP’s ER discusses in considerable detail the environmental risks involved in SNF transportation.²⁶³ As in *Suffolk*, transportation route

²⁵⁹ *Id.*

²⁶⁰ *Id.* (emphasis added).

²⁶¹ *Id.*

²⁶² SNF transportation is governed by separate requirements in 10 C.F.R. Parts 71 and 73 and through regulations issued by the DOT. *See, e.g.*, 10 C.F.R. § 71.0, “Purpose and scope.” *See also PFS*, LBP-99-34, 50 NRC at 176-77 (noting that “shipment of spent nuclear fuel [is] governed by Part 71 and do[es] not require a specific license under Part 72”).

²⁶³ *See, e.g.*, ER §§ 3.2, 4.2. *Cf. Suffolk*, 562 F.2d at 1377 (noting the agency’s EIS did the same).

selection will require a separate, and future, review and approval process.²⁶⁴ Likewise, route selection at this stage would be speculative at best, given the many other activities that must first occur before routes can even be selected. For example, the WCS CISF must be licensed and constructed, which is not expected to be complete until April 2022—more than three years from now.²⁶⁵ Furthermore, the specific locations of transportation origin²⁶⁶ (from any one or more reactor or ISFSI sites across the entire United States)²⁶⁷ must be identified after ISP negotiates contracts with specific customers. And the quantity and technical characteristics of specific SNF packages to be transported must be evaluated.²⁶⁸

Thus, transportation routing decisions, which are made on a shipment-by-shipment basis,²⁶⁹ will not occur until many years—or even decades²⁷⁰—from now. Meanwhile, the nation’s transportation infrastructure and community demographics (including the sizes and locations of minority and low-income communities) will continue to shift and evolve. As explained below, under these circumstances, the *Suffolk* factors confirm that ISP’s ER need not contain detailed EJ analysis of speculative transportation routes to satisfy NEPA’s “rule of reason.”

The first *Suffolk* factor considers “whether obtaining more detailed useful information on the topic of transportation is ‘meaningfully possible’ at the time when the EIS for an earlier stage

²⁶⁴ See generally 10 C.F.R. § 73.37(b)(1)(vi) (discussing NRC process and referencing applicable DOT regulations). Cf. *Suffolk*, 562 F.2d at 1377 (noting separate application and approval process).

²⁶⁵ ER at 1-2. Cf. *Suffolk*, 562 F.2d at 1376 (decisions “at least three years down the road”).

²⁶⁶ Cf. *Suffolk*, 562 F.2d at 1376, 1378 (identification of transportation origin locations across the “enormously far flung” 50-mile by 50-mile area needed to be identified before transportation routes could be finalized).

²⁶⁷ ER at 3-7 (“SNF would be transported from existing commercial nuclear power facilities across the U.S.”).

²⁶⁸ Cf. *Suffolk*, 562 F.2d at 1377 (quantity and quality of oil to be transported needed to be identified with specificity).

²⁶⁹ NUREG-0561 §§ 2.1, 2.1.1.

²⁷⁰ ER at 4-17 (noting transportation may occur over a period of 20 years).

is prepared.”²⁷¹ The answer here is plainly “no.” Petitioners claim that 218 million people across the United States live within 50 miles of a transportation corridor that hypothetically could be used for SNF transportation.²⁷² In essence, Petitioners assert that a detailed, block-group-by-block-group EJ analysis of over 77% of the U.S. population²⁷³—in countless permutations of potential, hypothetical future routing scenarios involving every highway, railroad, and navigable waterway across the entire United States—must be performed here to satisfy NEPA. This assertion is unsupported, and contrary to settled law. Moreover, the Petition is devoid of any explanation as to how a speculative EJ analysis of potential future routes, which will be separately selected and approved, initiated by separate applicants, years down the road, purportedly would be meaningful or even relevant at this time. Nor is there one.

As in *Suffolk*, although it is *possible* to project hypothetical transportation routes from various parts of the enormous geography of the United States, it is clear that detailed EJ analysis “would not yield information of practical use” and, in effect, “would amount to a meaningless exercise.”²⁷⁴ Indeed, such a massive undertaking would be “so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible.”²⁷⁵ Thus, the first *Suffolk* factor supports a conclusion that detailed EJ analysis of speculative transportation routes is not required here under NEPA.

²⁷¹ *Cf. Suffolk*, 562 F.2d at 1378 (citing *Morton*, 458 F.2d at 837).

²⁷² Petition at 87 (noting this figure was “based on 2000 Census data”) (citing Strolin Letter).

²⁷³ *See* Census 2000 Profile at 2.

²⁷⁴ *Cf. Suffolk*, 562 F.2d at 1378.

²⁷⁵ *Id.* (quoting *Callaway*, 524 F.2d at 88, in turn citing *Indian Lookout Alliance v. Volpe*, 484 F.2d 11 (8th Cir. 1973)).

The second *Suffolk* factor considers “how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project.”²⁷⁶ As noted above, the appropriateness of any given route—including whether SNF should (or should not) travel through any particular community—simply is not at issue in *this* proceeding.²⁷⁷ Indeed, routes can—and will—be “modified or changed in the future to minimize or eliminate environmental hazards disclosed as the result of information that will not become available until the future.”²⁷⁸ As in *Suffolk*, it would be “both unwise and unfair” to perform a detailed EJ analysis of hypothetical transportation routes, given that concrete information about the transportation phase has not yet come into focus.²⁷⁹ Thus, because detailed EJ analysis of speculative transportation routes would not meaningfully inform the NRC’s decision on the Application at hand, the second *Suffolk* factor also confirms that detailed EJ analysis of speculative transportation routes is not necessary here to satisfy NEPA.

3. Petitioners’ Unsupported and Immaterial Assertions of Alleged Discrimination Fail to Demonstrate an Admissible Contention

Petitioners devote an entire section of their Proposed Contention 5 discussion—Section D—to their assertion that the mere *process* of selecting transportation routes, itself, *will* have a disparate impact on minority and low-income populations.²⁸⁰ They further assert that “[t]he failure to identify and evaluate *all routes* through an Environmental Justice lens will also

²⁷⁶ *Id.* (citing *Callaway*, 524 F.2d at 88).

²⁷⁷ The Application contemplates that ISP’s *customers* would conduct their own transportation routing activities, including preparation of proposals for transportation routes that would be approved by the cognizant regulatory authorities.

²⁷⁸ *Cf. Suffolk*, 562 F.2d at 1378.

²⁷⁹ *Id.*

²⁸⁰ Petition at 87 (emphasis added).

preclude a search for, and consideration of, alternate routes through major urban zones.”²⁸¹

Petitioners offer no support, whatsoever, for these speculative and dubious assertions. For example, Petitioners offer no reasoned explanation as to how the absence of detailed EJ analysis of speculative transportation routes here (many years before route selections could even occur) somehow would “preclude” consideration of alternate routes in the transportation route selection process, which has not yet begun, and the whole point of which is to consider *alternate routes*. These illogical assertions cannot serve as the basis for an admissible contention.²⁸²

Petitioners also assert that the absence of detailed EJ analysis in the ER, itself, somehow amounts to “*de facto* discrimination,” contrary to E.O. 12,898.²⁸³ Never mind the baseless nature of the assertion, the Commission has squarely ruled that a “discrimination inquiry goes well beyond” NEPA, and thus is outside the scope of this proceeding.²⁸⁴ Thus, Petitioners’ unsupported assertion also is immaterial to the NRC’s consideration of the Application.

Finally, Petitioners’ discussion in Section E of Proposed Contention 5, which copies-and-pastes pages and pages of DOT regulations, orders, and policies—with little to no explanation—fails to identify a genuine dispute with the Application. Petitioners criticize the ER for failing to enumerate an exhaustive list of DOT regulations that purportedly are “pertinent” to future DOT decisions on transportation routing.²⁸⁵ However, they identify no requirement that purportedly has not been satisfied by the ER. And, to the extent Petitioners assert these regulations may

²⁸¹ *Id.* (emphasis added).

²⁸² Merely stating a conclusion “without providing a reasoned basis or explanation for that conclusion is inadequate” to demonstrate an admissible contention. *USEC*, CLI-06-10, 63 NRC at 472.

²⁸³ Petition at 89; *see also id.* at 81 (asserting that E.O. 12,898 requires EJ investigations to “address[] the question of whether WCS’s project will have the effect of unfairly targeting low-income and minority populations concentrations”).

²⁸⁴ *LES*, CLI-98-3, 47 NRC at 102-03.

²⁸⁵ Petition at 90.

somehow be applicable to entities other than ISP in obtaining future DOT approvals for certain transportation activities, Petitioners fail to explain how this purportedly disputes some position ISP has taken in the Application. Thus, Section D of Proposed Contention 5 fails to demonstrate a material issue or dispute with the Application as to a material issue of law or fact, and fails to support or demonstrate an admissible issue.

* * *

Accordingly, Proposed Contention 5 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

H. Proposed Contention 6 (Fracking) Is Inadmissible

Proposed Contention 6 states:

Horizontal hydraulic fracturing (“fracking”) activity is taking place in close proximity to the ISP/WCS site. It is technologically and legally possible that fracking will be undertaken directly beneath the waste storage areas of the site. Fracking has seismic, groundwater flow and water consumption implications, which become cumulative if extraction wells and/or waste injection disposal wells are developed near and/or underneath WCS. There is no indication in the Environmental Report or Safety Analysis Report of legal controls over present or potential oil and gas drilling directly beneath the site. The presence, overall, or mineral interests beneath or proximate to the waste storage portion of the ISP site is inadequately disclosed. Consequently, the realistic prospects for mineral development immediately surrounding and underneath the WCS site, and the implications for inducing or expediting geological problems including seismicity and groundwater movement, are unknown.²⁸⁶

As demonstrated below, Petitioners’ argument regarding mineral interests and legal controls is unsupported and without legal basis. Their further arguments about fracking, geological hazards (including induced seismicity), radiological releases, and corrosive effects are

²⁸⁶ *Id.* at 97-98.

likewise unsupported and also fail to address the Application content on the very topics challenged in this proposed contention. For these reasons, Proposed Contention 6 does not satisfy contention admissibility requirements specified in 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

1. Petitioners' Arguments Regarding Mineral Interests Are Unsupported

Petitioners argue that ISP has not disclosed the “mineral interests” or other “legal controls over present or potential oil and gas drilling directly beneath the site.”²⁸⁷ This topic is addressed in the ER, but perhaps not in the manner in which Petitioners desire. Nonetheless, Petitioners reference no legal requirement that a Part 72 applicant submit the additional information they demand.

As discussed in ER Section 3.1, “[t]he portion of the Waste Control Specialists land on which the WCS CISF would be constructed and operated would be controlled by ISP through a long term lease from ISP joint venture member Waste Control Specialists.” That ER Section further explains that “as the proposed CISF is not subject to local or county zoning, land use planning, or associated review process requirements, there are no known potential conflicts with land use plans, policies, or controls.” In ER Section 4.3 (Geology and Soils Impacts), the Applicant considered the foundation conditions at the site, and concluded that they “are generally good and no potential for mineral development exists or has been found at the site.” Thus, the Application considered mineral development and concluded that the potential does not exist. As demonstrated below, Petitioners also have not identified any plans for mineral development and they have not identified anything that would challenge the conclusions in the Application. For these reasons, Petitioners’ arguments about mineral rights do not support an admissible contention.

²⁸⁷ *Id.* at 98.

2. Petitioners' Arguments Regarding Fracking, Geological Hazards, and Radiological Releases Are Unsupported and Ignore Information in the Application

Petitioners claim: “The physical aspects of fracking as heavy industrial activity are a matter of concern to the operation of the CISF, which depends on very long-term geological and hydrological stability in order to minimize the chances of, or avoid entirely, potentially dangerous releases, leaks, emissions and/or spills of hazardous radioactive wastes.”²⁸⁸ They also reference 10 C.F.R. §§ 72.90, 72.94, 72.103 as requiring evaluations of seismic and siting issues.²⁸⁹ Nonetheless, Petitioners provide absolutely no explanation for why fracking would be a matter of concern, or how there could be any radiological release due to fracking. They provide no expert support or referenced material, but instead speculate that such impacts will occur. A contention “will be ruled inadmissible if the petitioner ‘has offered no tangible information, no experts, no substantive affidavits’, but instead only ‘bare assertions and speculation.’”²⁹⁰

Additionally, Petitioners ignore detailed information in the Application on these very topics, including information submitted to address 10 C.F.R. §§ 72.90, 72.94, 72.103 requirements. For example, geological stability is addressed in SAR Section 2.6 (Geology and Seismology) and ER Sections 3.3 (Geology and Soils) and 4.3 (Geology and Soils Impacts).²⁹¹ The safety of the facility and potential for radiological releases and their impact are addressed

²⁸⁸ *Id.* at 99.

²⁸⁹ *See id.* at 100-01. Additionally, some of these regulations address safety issues and the SAR, rather than the ER, as claimed by Petitioners. *See id.* at 101-02.

²⁹⁰ *Fansteel*, CLI-03-13, 58 NRC at 203 (quoting *Oyster Creek*, CLI-00-6, 51 NRC at 208).

²⁹¹ SAR Section 2.7 (Summary of Site Conditions Affecting Construction and Operating Requirements) also concludes: “Subsurface soils at the WCS CISF are suitable for supporting conventional foundations under both the static and dynamic loading conditions. There is no potential for liquefaction, collapse, or excessive settlement of these soils.” ER Section 4.3 (Geology and Soils Impacts) concludes: “Foundation conditions at the site are generally good and no potential for mineral development exists or has been found at the site.”

throughout the Application, which concludes that the WCS CISF will operate safely without groundwater contamination²⁹² and with only no or small environmental impacts related to these topics.²⁹³ To demonstrate a genuine dispute on a material issue of law or fact, 10 C.F.R. § 2.309(f)(1)(vi) requires that a contention “include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute.” Petitioners do not cite to any of this information, much less challenge it.²⁹⁴ Additionally, an allegation that some aspect of a license application is “inadequate” or unacceptable does not give rise to a genuine dispute unless it is supported by facts and a reasoned statement of why the application is unacceptable in some material respect.²⁹⁵

3. Petitioners’ Arguments Regarding Induced Seismicity Are Unsupported and Ignore Information in the Application

Petitioners briefly claim that “[f]racking and waste well activity can cumulatively contribute to the potential for induced seismicity.”²⁹⁶ They ignore, however, detailed information in the Application that addresses induced seismicity and related risks. For example, ER Subsection 3.3.3 directly addresses this topic by explaining that “[s]ome occur[r]ences of *induced seismicity* have also proven to be spatially correlated to active *hydrocarbon production*

²⁹² See, e.g., SAR at 2-35 (“The method of storage (dry cask), the nature of the storage casks, the extremely low permeability of the red bed clay and the depth to groundwater beneath the WCS CISF preclude the possibility of groundwater contamination from the operation of the WCS CISF.”).

²⁹³ See, e.g., ER at 4-70 (stating “NONE” for impacts to Seismic, Water Resources: Surface, and Water Resources: Ground, and “SMALL” for impacts to Soils and Waste Management).

²⁹⁴ Petitioners do not reference the SAR in any manner, and only provide two citations to the ER, both about land use. See Petition at 97-102.

²⁹⁵ See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-90-16, 31 NRC 509, 521, 521 n.12 (1990).

²⁹⁶ Petition at 99; see also *id.* at 100 (“ISP/WCS has ignored and failed to integrate evidence of groundwater at the site with such facts as the potential for induced geological faults from fracking; associated seismic activity . . .”).

in the region” and referring to “low to moderate rate of background seismicity, even that associated with *petroleum recovery activities*.”²⁹⁷ That subsection also relies on and references the Probabilistic Seismic Hazard Evaluation prepared by the Applicant to support the WCS CISF.²⁹⁸ That detailed Evaluation is provided as SAR Chapter 2, Attachment D, and includes an entire section devoted to induced seismicity.²⁹⁹ The results of that review are incorporated throughout the seismic hazard evaluation. Here again, Petitioners have failed to identify or dispute information in the ER or SAR on the very subject matter being challenged, thus rendering the proposed contention inadmissible.³⁰⁰

4. Petitioners’ Arguments Regarding Corrosive Effects Are Unsupported and Ignore Information in the Application

Petitioners claim that there is no investigation in the ER about the possible corrosive effects on steel casks, concrete bunkers, pads, and artificial substrate materials.³⁰¹ Petitioners reference only 10 C.F.R. § 72.120(d) for this argument, but that regulation is a safety regulation, not an environmental regulation. And it is fully addressed in the SAR.

Section 72.120(d) states:

The ISFSI or MRS must be designed, made of materials, and constructed to ensure that there will be no significant chemical, galvanic, or other reactions between or among the storage system components, spent fuel, reactor-related GTCC waste, and/or high level waste including possible reaction with water during wet loading and unloading operations or during storage in a water-pool

²⁹⁷ Emphasis added. *See also* SAR § 2.6.2 (“The absence of late-Quaternary faulting and the low to moderate rate of background seismicity, even that associated with petroleum recovery activities, results in relatively low seismic hazard at the WCS CISF.”).

²⁹⁸ ER at 3-11.

²⁹⁹ Attachment D is proprietary and withheld from public disclosure. Petitioners could have, but chose not to, seek access to the information in accordance with the procedures outlined in the Notice of Hearing Opportunity. *See* Notice of Hearing Opportunity, 83 Fed. Reg. at 44,073-075.

³⁰⁰ *See Summer*, CLI-10-1, 71 NRC at 21-22.

³⁰¹ Petition at 100.

type ISFSI or MRS. The behavior of materials under irradiation and thermal conditions must be taken into account.

As a preliminary matter, this regulation addresses interactions about storage system components and stored material, not with the environment. Additionally, the Application does not include any wet loading and unloading operations or a water-pool type ISFSI or MRS, and so those parts of the regulation are inapplicable.

The applicable parts of Section 72.120(d) are addressed throughout the Application. For example, SAR Section 11.5 states: “There is no significant degradation of any safety components caused by the effects of galvanic or chemical reactions or by the effects of the reactions combined with the effects of long-term exposure of the materials to neutron or gamma radiation, high temperatures or other possible conditions.” SAR Section 15.1.4 concludes that because only previously loaded canisters will be accepted at the WCS CISF, various topics (including Galvanic and Corrosive Reactions) remain unchanged from earlier reviews. The SAR Appendices for each cask system likewise address this topic.³⁰² Petitioners’ failure to identify or dispute information in the Application on the very subject matter being challenged renders the proposed contention inadmissible for failure to demonstrate a genuine dispute with the Application.³⁰³ Petitioners likewise have provided no support for their arguments.

* * *

Accordingly, Proposed Contention 6 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

³⁰² See SAR §§ A.3.4.6, B.3.4.6, C.3.4.6, D.3.4.6, E.7.1.4, E.7.2.4, F.7.1.4, and G.7.1.4.

³⁰³ See *Summer*, CLI-10-1, 71 NRC at 21-22.

I. Proposed Contention 7 (FOCD) Is Inadmissible

Proposed Contention 7 states:

Interim Storage Partners is majority controlled by a foreign corporation and is barred by statute and regulation from seeking or receiving a license from the Nuclear Regulatory Commission.³⁰⁴

Petitioners quote from the Application, which identifies ISP’s indirect French foreign ownership,³⁰⁵ for their claim that “ISP/WCS have not provided evidence that ISP is not ‘foreign owned, controlled or dominated’ (FOCD) by Orano.”³⁰⁶ They also reference various statutory provisions (AEA Sections 103(d) and 104(d)), NRC regulations (10 C.F.R. § 50.38), and NRC guidance (FOCD Standard Review Plan (“SRP”)),³⁰⁷ related to FOCD requirements.³⁰⁸

Petitioners make the puzzling assertion that “[t]here is no dispute that [these provisions] are applicable to this proceeding,” and conclude that the Application does not comply therewith.³⁰⁹

As demonstrated below, however, Petitioners’ assertions are illogical, given that the FOCD requirements they reference are not applicable here. In short, the WCS CISF is not a utilization or production facility subject to the provisions of AEA Sections 103 or 104, 10 C.F.R. § 50.38, or the FOCD SRP; instead, the WCS CISF is a SNF storage facility subject to 10 C.F.R. Part 72 requirements, which do not address FOCD.³¹⁰ Thus, Proposed Contention 7 should be

³⁰⁴ Petition at 102.

³⁰⁵ “ISP is majority owned and controlled by Orano CIS, which is owned 100% by Orano USA LLC. Orano CIS and Orano USA are both limited liability companies formed in the State of Delaware. Orano USA is ultimately majority owned and controlled by FAE AEC, an entity of the French government.” *Id.* at 103 (quoting Application at 1-4).

³⁰⁶ Petition at 103-04.

³⁰⁷ Final Standard Review Plan on Foreign Ownership, Control or Domination, 64 Fed. Reg. 52,355 (Sept. 28, 1999) (“FOCD SRP”).

³⁰⁸ Petition at 102-07.

³⁰⁹ *Id.* at 104, 106.

³¹⁰ The Application seeks an NRC license to “receive, acquire and possess” special nuclear material in the form of “power reactor spent fuel and other [designated] radioactive materials associated with spent fuel storage” consistent with Section 53 of the Atomic Energy Act (42 U.S.C. § 2073) and 10 C.F.R. Part 72.

dismissed for raising issues outside the scope of this proceeding, and failure to identify a material issue or a genuine dispute with the Application, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii), (iv) and (vi).

First, although Petitioners reference AEA Section 103 (42 U.S.C. § 2133) and Section 104 (42 U.S.C. § 2134),³¹¹ those statutes do not apply to the WCS CISF, much less impose any FOCD requirements applicable to this proceeding. Both Section 103(d) and Section 104(d) state that “[n]o license may be issued . . . if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.” But Section 103(a) and Sections 104(a), (b), and (c) explain that the referenced “licenses” are for “utilization and production facilities.”

The WCS CISF is neither a utilization nor a production facility. Contrary to the definition of “utilization facility” in AEA Section 11 (42 U.S.C. § 2014),³¹² a CISF does not “make use” of special nuclear material in any manner, has not been determined by rule to do so, and is not a component part as determined by the Commission. Similarly, contrary to the definition of “production facility” in AEA Section 11,³¹³ a CISF is not capable of the production

Cf. Proposed License Conditions, Application Chapter 13, Attach. A, page 1 of 3. Even had Petitioners sought to raise an inimicality issue pursuant to AEA Section 57, separate from FOCD requirements, they also would fail. Petitioners have not identified any actual inimicality concerns raised by the ownership of ISP. This is particularly the case given that ISP, Orano CIS, and Orano USA are all U.S. companies; ISP is almost half owned by WCS; and the ISP Board members and principal officers are all U.S. citizens. *See* Application at 1-4. In fact, Orano, previously Areva, sought and received a license under Part 70 from the NRC for the Eagle Rock Enrichment Facility subject to the same inimicality requirement. *See* Materials License No. SNM-2015 (ML111650409); *compare* 10 C.F.R. §§ 70.31(d) and 70.40(b) *with* 10 C.F.R. § 72.40(a)(14).

³¹¹ *See* Petition at 102-04.

³¹² 42 U.S.C. § 2014(cc); *see also* 10 C.F.R. § 50.2 (defining utilization facility to mean: “(1) Any nuclear reactor other than one designed or used primarily for the formation of plutonium or U-233; or (2) An accelerator-driven subcritical operating assembly used for the irradiation of materials containing special nuclear material and described in the application assigned docket number 50-608”). The WCS CISF is not a nuclear reactor, nor is it an accelerator-driven subcritical operating assembly.

³¹³ 42 U.S.C. § 2014(v) (citations omitted); *see also* 10 C.F.R. § 50.2 (defining utilization facility to mean: “(1) Any nuclear reactor designed or used primarily for the formation of plutonium or uranium-233; or (2)

of special nuclear material in any manner, has not been determined by rule to do so, and is not a component part as determined by the Commission. Because the WCS CISF is not a utilization or production facility, the referenced FOCD provisions in AEA Sections 103(d) and 104(d) do not apply to it.

Second, although Petitioners also reference 10 C.F.R. § 50.38³¹⁴ as a basis for applying FOCD requirements to the WCS CISF,³¹⁵ that regulation is in 10 C.F.R. Part 50, “Domestic Licensing of Production and Utilization Facilities,” and does not apply to the WCS CISF. Similar to the FOCD provisions in AEA Sections 103(d) and 104(d), Section 50.38 refers to obtaining a “license.” But Part 50 defines a “license” to mean a construction permit or operating license under Part 50; an early site permit, combined license, or manufacturing license under Part 52; or a renewed license under Parts 50, 52, or 54.³¹⁶ ISP is not seeking any of those types of licenses under Parts 50, 52, or 54; instead, ISP is seeking a Part 72 license. Section 50.38 does not apply to a Part 72 license.³¹⁷ Moreover, Section 50.38 was implemented as part of a

Any facility designed or used for the separation of the isotopes of plutonium, except laboratory scale facilities designed or used for experimental or analytical purposes only; or (3) Any facility designed or used for the processing of irradiated materials containing special nuclear material, except [specified exceptions]). The WCS CISF is not a nuclear reactor, is not used for the separation of the isotopes of plutonium, and does not process irradiated materials containing special nuclear material.

³¹⁴ Section 50.38 states: “Any person who is a citizen, national, or agent of a foreign country, or any corporation, or other entity which the Commission knows or has reason to believe is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government, shall be ineligible to apply for and obtain a license.”

³¹⁵ See Petition at 102-03.

³¹⁶ 10 C.F.R. § 50.2.

³¹⁷ Additionally, Part 72 does not include an FOCD provision similar to 10 C.F.R. § 50.38. Indeed, whereas 10 C.F.R. § 50.33(d)(3) requires a Part 50 applicant to state “[w]hether it is owned, controlled, or dominated by an alien, a foreign corporation, or foreign government,” the comparable provision in 10 C.F.R. § 72.22(d)(3) omits such a requirement. 10 C.F.R. § 72.40(a)(14) instead requires a finding that “[t]he issuance of the license will not be inimical to the common defense and security.”

rulemaking in 1956 to address Part 50 licensing of production and utilization facilities,³¹⁸ but as demonstrated above, the WCS CISF is neither.

Finally, although Petitioners refer to the FOCD SRP as imposing requirements upon the WCS CISF,³¹⁹ that SRP provides guidance on the above statutory and regulatory requirements, and so does not apply for the reasons discussed above. Indeed, the FOCD SRP repeatedly states that it is providing guidance on the FOCD restrictions in AEA Sections 103 and 104 and to address 10 C.F.R. § 50.38.³²⁰ And there is nothing in the FOCD SRP, and Petitioners have identified nothing, that would apply the FOCD SRP to a Part 72 license.³²¹ Therefore, the statements in Proposed Contention 7 related to the SRP regarding ownership percentages, foreign control, FOCD factors, and Negation Action Plans do not apply to the WCS CISF.³²²

³¹⁸ Part 50—Licensing of Production and Utilization Facilities, 21 Fed. Reg. 355 (Jan. 19, 1956). That rulemaking did not address Part 72 licenses in any manner. Indeed, the only other regulations that direct an applicant to Section 50.38 are those in 10 C.F.R. §§ 50.45, 52.75, and 52.155, which apply to construction permits and operating licenses under Part 50 and combined licenses and manufacturing licenses under Part 52. ISP is not seeking such a license.

³¹⁹ See Petition at 104-06.

³²⁰ For example, the very first paragraph of the SRP states: “The NRC is issuing this [SRP] to describe the process it uses to review the issue of whether an applicant for a nuclear facility license *under sections 103 or 104 of the [AEA]* is owned, controlled, or dominated by an alien, a foreign corporation or a foreign government.” FOCD SRP, 64 Fed. Reg. at 52,357 (emphasis added); see also *e.g., id.* at 52,355 (“The SRP . . . contains the review procedures used by the staff to evaluate applications for the *issuance . . . of a production or utilization facility license in light of the prohibitions in sections 103d and 104d of the Atomic Energy Act and in 10 CFR 50.38 against issuing such reactor licenses [to certain entities] . . .*”) (emphasis added).

³²¹ Additionally, although the Staff is in the process of updating the FOCD SRP and issued a draft update in 2016, that draft update likewise ties the FOCD SRP to AEA Sections 103 and 104 and 10 C.F.R. § 50.38. See Draft Standard Review Plan on Foreign Ownership, Control or Domination, Revision 1, 81 Fed. Reg. 24,893 (Apr. 27, 2016) (providing a public comment opportunity for the Draft Standard Review Plan on Foreign Ownership, Control, or Domination, Revision 1 (ML16048A025), which states: “The [NRC] is issuing this revision to the [FOCD SRP] to provide guidance and establish procedures for NRC staff’s review of whether an applicant for a nuclear facility license, *issued under sections 103 or 104 of the [AEA]* is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.” (emphasis added); see also *id.* at 1-1 to 1-2 (identifying AEA Sections 103(d) and 104(d) and 10 C.F.R. § 50.38 as relevant statutory and regulatory provisions)).

³²² The only case referenced by Petitioners in Proposed Contention 7 is *General Electric Co.*, 3 AEC 99 (1966). See Petition at 105. That case also is referenced in the FOCD SRP, and likewise addresses production and utilization facilities (*i.e.*, reactors) and does not mention Part 72 in any manner.

* * *

Accordingly, Proposed Contention 7 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iii), (iv) and (vi).

J. Proposed Contention 8 (Alternatives) Is Inadmissible

Proposed Contention 8 states:

The no-action alternative in the WCS ER is incomplete because it does not acknowledge safer storage methods at reactor sites, such as hardened on-site storage (“HOSS”), nor does it acknowledge the NRC’s Continued Storage Rule that concludes that waste can be safely stored at reactor sites indefinitely.

There are at least four alternatives to the proposed CISF project which are neither recognized nor addressed in the Environmental Report, contrary to NEPA requirements.³²³

Petitioners argue that the ER failed to consider a total of five alternatives to the proposed project, including HOSS, and thus omitted material information from the Application.³²⁴

Petitioners also argue that ISP avoided a comparison of its preferred action with its no-action alternative and the five alternatives proposed by Petitioners.³²⁵ Additionally, Petitioners claim that ISP did not disclose the core findings of the CSR, which they allege found no advantage to consolidated storage.³²⁶ However, Petitioners fail to explain, much less demonstrate, how these purported omissions amount to a material deficiency in the ER’s treatment of alternatives.

Accordingly, Petitioners’ unsupported and immaterial Proposed Contention 8 fails to demonstrate a genuine dispute with the Application on a material issue of law or fact, and must be rejected.

³²³ Petition at 107.

³²⁴ *Id.* at 109.

³²⁵ *Id.* at 111.

³²⁶ *Id.* at 109.

1. The ER Appropriately Describes Alternatives to the Proposed Action

NRC’s NEPA implementing regulations in 10 C.F.R. Part 51 require a Part 72 applicant to submit an ER that addresses the environmental impacts of the proposed action and compares those impacts to the impacts of reasonable alternatives, including a no-action alternative.³²⁷ The scope of alternatives an ER must address is not open ended, however, and is “tempered by a practical rule of reason.”³²⁸

Relevant NRC guidance states that “[t]he no-action alternative is a discussion of the results from a lack of action (i.e., status quo or the existing state).”³²⁹ The guidance also states that “[f]or the no-action alternative, the proposed action would not take place. This serves as a baseline for comparing alternatives.”³³⁰ The guidance provides an example that is particularly relevant to this Application: “For example, in a license application proposing new construction and/or activities the no-action alternative would be to not grant the license (i.e., no construction or activity).”³³¹

ISP’s ER contains discussion of alternatives that is consistent with this guidance and NRC regulations in Part 51. The ER states that “[t]he no action alternative for ISP would be to not construct and operate the CISF. Under the no action alternative, the NRC would not approve the license application that would allow ISP to construct and operate the proposed facility.”³³²

The no-action alternative would result in decommissioned reactor sites not being returned to

³²⁷ See 10 C.F.R. § 51.60 (requiring the ER to provide the information required by 10 C.F.R. § 51.45); see also 10 C.F.R. § 51.45(c).

³²⁸ *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), CLI-16-7, 83 NRC 293, 326 (2016) (quoting *Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-22, 72 NRC 202, 208 (2010)).

³²⁹ NUREG-1748 at 3-9 (Section 3.4.4).

³³⁰ *Id.* at 5-6 (Section 5.2.3).

³³¹ *Id.*

³³² ER at 2-1.

greenfield status, and the sites would continue to host an ISFSI for on-site storage of SNF.³³³

The no-action alternative would also result in currently-operating reactors constructing new or expanding existing ISFSIs and maintaining existing physical security programs for the ISFSIs.³³⁴

The description of the no-action action alternative in ISP's ER thus provides the necessary information to set a baseline to compare alternatives as required by NRC regulations.

2. Petitioners Fail to Identify Any Material Deficiency in the ER's Discussion of Alternatives to the Proposed Action

a. HOSS Is Not a "Reasonable" Alternative

Petitioners claim that the ER's discussion of alternatives is deficient because it does not analyze HOSS as an alternative method of storing SNF at existing reactor sites.³³⁵ However, Petitioners provide no basis for this assertion. Nor is there one. As a matter of law, an applicant's ER "need only discuss those alternatives that are reasonable and 'will bring about the ends' of the proposed action."³³⁶ As discussed in ISP's response to Proposed Contention 2,³³⁷ a key purpose of the proposed project is the removal of SNF from at-reactor ISFSIs. HOSS, which Petitioners envision being built *at reactor sites*,³³⁸ would not fulfill this purpose. As the Commission has observed, "[w]hen the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved."³³⁹ Accordingly, HOSS was properly excluded from the no-action alternative discussion in the ER.

³³³ *Id.* at 2-1 to 2-2.

³³⁴ *Id.* at 2-2.

³³⁵ Petition at 108.

³³⁶ *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 55 (2001) (quoting *Busey*, 938 F.2d at 195).

³³⁷ *See supra* § IV.D.

³³⁸ Petition at 53.

³³⁹ *Hydro Res.*, CLI-01-4, 53 NRC at 55 (quoting *Busey*, 938 F.2d at 195, in turn citing *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (per curiam), *cert. denied*, 484 U.S. 870 (1987)).

Even assuming, for arguments' sake, HOSS could satisfy the purpose and need of the proposed action, there simply is no requirement for an applicant to examine a “conceptual design”³⁴⁰ such as HOSS in its discussion of alternatives. The Supreme Court has held that NEPA’s “concept of alternatives must be bounded by some notion of feasibility,” and has recognized that:

NEPA was not meant to require detailed discussion of . . . alternatives [] deemed only remote and speculative possibilities . . . not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed. . . . [Moreover, NEPA documents] cannot be found wanting simply because the [author] failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that [a NEPA document] fails because the [author] failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been³⁴¹

HOSS is precisely the type of “remote and speculative” alternative contemplated by the Court. Further to their demand for consideration of HOSS, Petitioners reference to a 2003 report prepared by Dr. Thompson.³⁴² However, that report explicitly acknowledges the remote and speculative nature of this theoretical proposition. Specifically, Dr. Thompson notes that the HOSS theory involves multiple unresolved “technical issues” that will require “[a]dditional analysis, supported by experiments . . . to test and refine this design approach” to even “determine the *feasibility* of implementing” it.³⁴³ Then, assuming this extensive research and development yields a conclusion that HOSS is, in fact, feasible, additional “detailed,

³⁴⁰ Letter from Roy Zimmerman, Director of the Office of Nuclear Security and Incident Response to Mark Jacobs, Indian Point Safe Energy Coalition (Nov. 10, 2004) (ML042660116).

³⁴¹ *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 551 (1978) (quoting *Morton*, 458 F.2d at 837-38).

³⁴² Petition at 108 (citing G. Thompson, Robust Storage of Spent Nuclear Fuel: A Neglected Issue of Homeland Security (Jan. 2003) (“Thompson Report”), available at <https://www.nirs.org/wp-content/uploads/reactorwatch/security/sechossrpt012003.pdf>).

³⁴³ Thompson Report at 8 (emphasis).

engineering-design studies” and “a variety of governmental actions,” such as “new regulations and guidance” and “new legislation” would be required prior to implementation.³⁴⁴ Because HOSS is a remote and speculative alternative, ISP had no duty to consider it in the ER. Thus, Proposed Contention 8 fails to identify, with adequate support, a genuine material dispute with the Application for this additional reason.³⁴⁵

b. Petitioners’ Other “Action Alternatives” Identify No Deficiency in the ER’s Discussion of Alternatives

Petitioners first claim that the ER should have considered “establishment of a Dry Transfer System or equivalent capability to repackage SNF at the ISP site.”³⁴⁶ But Petitioners fail to explain why a dry transfer system being built at the site would be an alternative at all, much less a reasonable one, to building the WCS CISF.

Second, Petitioners claim that the ER should have considered “modification of the site’s Emergency Response Plan to include preparations for emissions mitigation (*i.e.*, reduction of emissions to the surrounding environment of radiation and/or radioactive material from SNF as a result of damage to SNF assemblies and/or SNF containers).”³⁴⁷ But Petitioners fail to explain how a modification to the Emergency Response Plan is a reasonable alternative to building the WCS CISF.

Third, Petitioners claim that the ER should have evaluated “modification of the ISFSI design so that SNF stored at the ISP facility would be more robust against accident, attack,

³⁴⁴ *Id.*

³⁴⁵ To the extent Petitioners seek to enlarge the regulatory requirements of what must be addressed in the no-action alternative, this is an impermissible challenge to NEPA and NRC regulations, and cannot support an admissible contention. 10 C.F.R. § 2.335(a); *Shearon Harris*, LBP-07-11, 66 NRC at 57-58 (stating that a contention that attacks applicable statutory requirements “must be rejected by a licensing board as outside the scope of the proceeding”) (citing *Peach Bottom*, ALAB-216, 8 AEC at 20).

³⁴⁶ Petition at 107-08.

³⁴⁷ *Id.*

and/or removal of SNF assemblies or their components for malevolent purposes.”³⁴⁸

Nonetheless, Petitioners have not identified any actual alternative design that purportedly should have been considered.

And finally, Petitioners claim that the ER should have considered “ownership, design, and control of the facility by the US federal government (together with a competent disclosure that there is no legal authority for such).”³⁴⁹ But Petitioners do not explain how ownership by the Federal Government is a reasonable alternative to ISP building the WCS CISF. Indeed, ISP did not address potential government ownership because it would not satisfy a key purpose and need of the project, which is to provide a *private* interim storage facility *until* a permanent government repository becomes available.³⁵⁰

Again, as to each of these purported alternatives, “[w]hen the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.”³⁵¹ Simply put, these proposed alternatives, which Petitioners merely mention without any explanation of how they purportedly identify some deficiency in the ER, simply do not identify any material omission in the ER, and thus fail to provide a basis for an admissible contention.

c. *The ER Contains a Cost-Benefit Analysis and an Adequate Comparison of Alternatives*

Petitioners, while acknowledging that NEPA “does not require a cost benefit analysis,” claim that the ER is incomplete because ISP did not provide a cost-benefit analysis

³⁴⁸ *Id.* at 108.

³⁴⁹ Petition at 108.

³⁵⁰ ER at 1-6.

³⁵¹ *Hydro Res.*, CLI-01-4, 53 NRC at 55 (quoting *Busey*, 938 F.2d at 195, in turn citing *Hodel*, 803 F.2d at 1021).

“demonstrating the overall costs and benefits of leaving the waste at the reactor site compared to the benefits and costs of sending waste from many reactors to ISP.”³⁵² This argument, however, ignores Chapter 7 of the ER which provides just such an analysis. Petitioners’ failure to dispute (or even acknowledge) the relevant analysis in the ER is dispositive to demonstration of any purported dispute with the Application. The Commission has stated that a petitioner must “read the pertinent portions of the license application”³⁵³ If a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine dispute.³⁵⁴

Along the same lines, to the extent Petitioners imply the ER contains “misleading economic assumptions,”³⁵⁵ they simply misread or misunderstand the relevant analysis. For example, Petitioners cite the ER’s observation that the obligation to “maintain a physical security program” places a burden on operators of on-site ISFSIs.³⁵⁶ Petitioners further allege that this observation fails to consider the “overall benefits and costs” of the two alternatives because “security is a role that would merely be transferred to ISP were the CISF licensed.”³⁵⁷ However, this ignores the ER’s explanation that, by consolidating the SNF at a central location, savings will be realized through “economies of scale” as to security, monitoring, and other functions.³⁵⁸ Petitioners’ imprecise reading of the ER simply cannot form the basis for a litigable

³⁵² Petition at 111.

³⁵³ Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also* Millstone, CLI-01-24, 54 NRC at 358.

³⁵⁴ *See* Millstone, LBP-04-15, 60 NRC at 95; *see also* Summer, CLI-10-1, 71 NRC at 21-22.

³⁵⁵ Petition at 111 (quoting *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446, 448 (4th Cir. 1996)).

³⁵⁶ *Id.* (citing ER § 2.1).

³⁵⁷ *Id.*

³⁵⁸ ER at 7-36.

contention.³⁵⁹ By ignoring the relevant discussion, Petitioners have failed to raise a genuine dispute with the Application.³⁶⁰

d. The ER Discusses the CSR Contrary to Petitioners' Claim

Petitioners also claim that the ER lacks a discussion about the safety aspects of keeping the waste at the reactor sites, and does not discuss the CSR.³⁶¹ However, Petitioners fail to provide any explanation for the proposition that the alternatives discussion must somehow evaluate the CSR, or provide a comparative *safety* analysis in the *environmental* report. Moreover, safety and security were not the focus of the CSR GEIS, which presents the NRC's generic findings as to the *environmental* effects of the continued storage of SNF.³⁶² Furthermore, Section 8.3 of the ER provides an extensive discussion of the CSR and the CSR GEIS—a discussion Petitioners entirely ignore. More importantly, neither Section 8.3, nor the ER's discussion of alternatives, claims or assumes that it would be unsafe to store the SNF on-site; indeed, continued on-site storage *is* the no-action alternative. Ultimately, Petitioners' unsupported assertion that the ER is somehow deficient in this regard—without so much as an explanation—fails to demonstrate a genuine material dispute with the Application.³⁶³

* * *

Accordingly, Proposed Contention 8 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

³⁵⁹ *Ga. Tech.*, LBP-95-6, 41 NRC at 300.

³⁶⁰ *See Millstone*, LBP-04-15, 60 NRC at 95; *see also Summer*, CLI-10-1, 71 NRC at 21-22.

³⁶¹ *Petition* at 109.

³⁶² *See* NUREG-2157 at iii (noting the CSR GEIS “generically determines the *environmental* impacts of continued storage” (emphasis added)).

³⁶³ *Summer*, CLI-10-1, 71 NRC at 21-22; *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 247-48 (1993) (holding that a proposed contention is fatally flawed when the petitioner identified no facts or expert opinion, and references no documents or other sources establishing the existence of a genuine dispute on a material issue of law or fact).

K. Proposed Contention 9 (Benefit-Cost Analysis) Is Inadmissible

Proposed Contention 9 states:

ISP maintains that establishment of the proposed ISP facility would financially benefit the US federal government. There is considerable dispute over whether the proposed action of opening a CISF at Interim Storage Partner’s site in west Texas will provide over \$5 billion of net economic benefit to the U.S. Government.³⁶⁴

Petitioners claim that ISP’s ER is deficient because it “provides no ‘benefit-cost analysis.’”³⁶⁵ Petitioners argue that Table 7.4-1 in the ER “is misleading and not a *bona fide* cost-benefit analysis”³⁶⁶ because it only depicts the purported benefits of the project, does not quantify “readily-quantifiable environmental impacts,” and does not explain the cost burden that would be shouldered by DOE no matter the location of SNF facilities.³⁶⁷ In other words, Petitioners claim that the ER highlights the benefits of the proposed project while avoiding any discussion of the costs. Petitioners’ argument, however, relies on an incomplete reading of the ER, which includes a benefit-cost analysis. As a result, this proposed contention is inadmissible because it lacks supporting facts or expert opinions and fails to demonstrate a genuine dispute with the Application as required by 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

Although Petitioners claim that the ER has “no benefit-cost analysis,”³⁶⁸ the ER in fact contains an entire chapter titled “Benefit-Cost Analysis.”³⁶⁹ The ER states that “[t]he analysis is performed by using cost data from eight, selected shutdown nuclear power plants in the United

³⁶⁴ Petition at 112.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 114.

³⁶⁷ *Id.* at 113.

³⁶⁸ *Id.* at 112.

³⁶⁹ ER Chapter 7.

States and then extrapolating these data for the CISF’s full 40,000 MTU capacity.”³⁷⁰ The ER identifies the “*net reduction* of federal reimbursements to the operators of nuclear power plants for their costs associated with prolonged storage of spent fuel” as the “primary economic benefit associated with the proposed action.”³⁷¹ But it also states that other anticipated economic benefits from the proposed project are “related to repurposing of land at most of the plant sites.”³⁷²

For costs, the ER states that “due to the limited amount of information on this topic, this analysis incorporates assumptions and cost estimates from the Electric Power Research Institute’s (“EPRI”) 2009 report, Cost Estimate for an Away-From-Reactor Generic Interim Storage Facility (“GISF”) for Spent Nuclear Fuel adjusting them to 2015 dollars using the CPI and adjusting values where appropriate for the circumstances of the proposed action.”³⁷³ The ER then provides projected capital costs, transportation costs, operating and administrative costs, and labor costs.³⁷⁴

After developing an estimate of the project benefits in Section 7.2 and project costs in Section 7.3, the ER then compares the estimated benefits and costs of the proposed action in Section 7.4.³⁷⁵ Petitioners claim that this comparison is incomplete because Table 7.4-1 in the ER only depicts purported benefits.³⁷⁶ On the next page, however, is Table 7.4-2, which

³⁷⁰ *Id.* at 7-1.

³⁷¹ *Id.* at 7-4 (emphasis in original).

³⁷² *Id.*

³⁷³ *Id.* at 7-15.

³⁷⁴ *Id.* at 7-15 to 7-28.

³⁷⁵ *Id.* at 7-29 to 7-35.

³⁷⁶ Petition at 113.

summarizes the costs.³⁷⁷ To compare the estimated benefits with the estimated costs, Petitioners only had to compare the two tables, which they did not do.

Petitioners also claim that the ER is deficient because it “does not explain what the Federal Government would have to pay, anyway, for continued storage of SNF at reactor sites under existing legislation and DOE contracts with utilities, plus contemporaneous large payments for the opening and operation of the WCS/ISP CISO, including all related activities such as transportation.”³⁷⁸ But again, the ER contains the information that Petitioners claim is missing. The ER provides an estimate of the costs of continued storage of SNF at reactor sites without the proposed project.³⁷⁹ The ER also provides cost estimates for transportation,³⁸⁰ operating costs,³⁸¹ and labor costs.³⁸² As for payments from DOE, the ER notes that the exact reimbursable costs are not yet known and that ISP anticipates entering into contracts with DOE or the SNF Title Holders that would provide funding for facility construction, operation and decommissioning.³⁸³

In short, Petitioners claim that the ER is deficient because it does not contain a benefit-cost analysis and does not provide estimates of specific costs. But as shown above, the ER has an entire chapter on the subject and performs the analysis that Petitioners claim was omitted. As a result, this proposed contention is unsupported and inadmissible. Furthermore, the Commission has stated that a petitioner must “read the pertinent portions of the license

³⁷⁷ ER at 7-31.

³⁷⁸ Petition at 113.

³⁷⁹ ER at 7-6 to 7-7.

³⁸⁰ *Id.* at 7-18 to 7-26.

³⁸¹ *Id.* at 7-26 to 7-27.

³⁸² *Id.* at 7-27 to 7-28.

³⁸³ *Id.* at 7-15.

application”³⁸⁴ If a petitioner submits a contention of omission, but the allegedly missing information is indeed in the license application, then the contention does not raise a genuine dispute.³⁸⁵

* * *

Accordingly, Proposed Contention 9 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(v) and (vi).

L. Proposed Contention 10 (*De Facto* Repository) Is Inadmissible

Proposed Contention 10 states:

WCS plans to provide long-term SNF storage for up to either 40, 60 or 100 years, depending on which statement one wishes to rely on or until a geological repository is developed. The indefinite length of the interim storage scheme requires NEPA evaluation beyond 60 years of operations.³⁸⁶

Petitioners further argue in Proposed Contention 10 that the “estimates of the operational life of the WCS SNF/GTCC facility fail to dispel legitimate questions as to whether WCS might become a *de facto* repository, and whether its fitness and suitability for storing high-level spent nuclear fuel on the surface of the Texas desert *for hundreds, or even thousands of years, or forever*, should be considered under NEPA.”³⁸⁷

Proposed Contention 10 is inadmissible because it is an unambiguous, unauthorized frontal assault on the CSR (10 C.F.R. § 51.23) in that it is focused solely on the environmental impacts of storage of SNF at the site long *after* the proposed term of the WCS CISF license. But 10 C.F.R. § 51.23(b) states that ERs prepared pursuant to 10 C.F.R. § 51.61, the provision

³⁸⁴ Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170; *see also* Millstone, CLI-01-24, 54 NRC at 358.

³⁸⁵ *See* Millstone, LBP-04-15, 60 NRC at 95; *see also* Summer, CLI-10-1, 71 NRC at 21-22.

³⁸⁶ Petition at 114.

³⁸⁷ *Id.* at 115 (emphasis added).

applicable to ISP’s Application, are not required to consider the environmental impacts of SNF storage beyond the term of the license being sought. In Proposed Contention 10, Petitioners assert, without request for waiver, precisely the opposite and, therefore, it constitutes a direct challenge to the Commission’s regulations, contrary to 10 C.F.R. § 2.335. Accordingly, Proposed Contention 10 is immaterial, unsupported, outside the scope of the proceeding, and fails to dispute the Application, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

1. The ER Appropriately Evaluates Environmental Impacts from Storage of SNF During the Proposed Term of the WCS CISF License

As described in its Application, ISP is requesting a license for a term of 40 years—the maximum authorized by 10 C.F.R. § 72.42—to construct and operate a CISF.³⁸⁸ Accordingly, the ER properly considers the impacts of construction and operation of the WCS CISF on the environment for 40 years, as required by NEPA and 10 C.F.R. § 51.45(b). As noted in the Application, ISP also may seek one or more renewals of the WCS CISF license pursuant to 10 C.F.R. § 72.42 (each of which would require its own NEPA review as separate actions). Thus, as a practical matter, ISP “anticipates continued storage for approximately 60 years or until a permanent repository is licensed and operating.”³⁸⁹ However, because the CSR GEIS *already* has evaluated the impacts of continued storage of SNF *beyond* the term of a CISF license; and the CSR exempts CISF licensees from further site-specific analysis of those impacts, ISP simply is *not required* to discuss the impacts of storage beyond 40 years—even if it anticipates storing SNF for 60 or 100 years. Those impacts already have been evaluated—and codified—in the CSR. The CSR “has generically determined that the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation . . . are those impacts identified in

³⁸⁸ Application at 1-5.

³⁸⁹ ER at 1-2.

NUREG-2157.”³⁹⁰ The NRC’s findings in the CSR GEIS are therefore codified in the regulations, and incorporated into ISP’s ER.

Specifically, Section 5.0 of the CSR GEIS describes in detail the environmental impacts of away-from-reactor storage, including land use, socioeconomics, environmental justice, air quality, climate change, geology and soils, surface-water quality and use, groundwater quality and use, terrestrial resources, aquatic ecology, special status species and habitats, historical and cultural resources, noise, aesthetics, waste management, transportation, and public and occupational health.³⁹¹ For each of these categories, the CSR GEIS considers the impacts over the course of three timeframes: (1) short-term storage, defined as 60 years beyond the expiration of reactor operations, *i.e.*, the activity that generated SNF, and assumes that a geological repository becomes available in this timeframe; (2) long-term storage, defined as 100 years after the end of the short-term storage timeframe, and assumes that a geological repository becomes available in this timeframe; and (3) indefinite storage, which assumes no repository becomes available and therefore the away-from-reactor facility must continue to handle and store SNF.³⁹² In short, the CSR GEIS does generically everything that Petitioners are asking ISP to do individually. Ultimately, Proposed Contention 10 simply is unsupported and fails to identify a material deficiency in the ER or a genuine dispute with the Application, and should be summarily rejected.

³⁹⁰ 10 C.F.R. § 51.23(a).

³⁹¹ NUREG-2157 at xlvi to lix.

³⁹² NUREG-2157 at 1-13 to 1-15.

2. Petitioners Are Precluded from Challenging the CSR by 10 C.F.R. § 2.335

Proposed Contention 10 broadly asserts that the ER must consider the potential impacts from the WCS CISF becoming a *de facto* repository for the indefinite storage of SNF.

Petitioners argue that the ER:

[M]ust be required to investigate, analyze and discuss the circumstances where CISF storage is indefinitely the only option for a period beyond the first century of operations. A hundred years from now, the United States will be dramatically different, possibly much poorer and less capable of sustaining the ongoing expense of managing the radioactive wastes at WCS, or of moving them to a permanent geological repository. Political and economic considerations are hard to predict a century out, but ISP, itself, has left open the question of the ultimate length of the operating life of the CISF.³⁹³

Petitioners also assert that “[t]he prospect that the WCS CISF might become, by default, an ‘indefinite’ or ‘permanent’ storage facility is highly significant. The site specific analysis under NEPA analysis of the CISF changes the site-specific analysis to an entirely different, longer time continuum, with commensurately altered expectations concerning the management of the waste.”³⁹⁴ Petitioners’ concerns plainly and solely relate to the potential impacts from long-term or indefinite storage—well beyond the proposed licensed life of the WCS CISF.

As discussed above, however, the CSR explicitly exempts ISP (and the NRC) from having to consider the environmental effects of indefinite storage of SNF in this proceeding. To the extent Petitioners argue otherwise, Proposed Contention 10 amounts to an unauthorized, impermissible challenge to NRC regulations and is barred by 10 C.F.R. § 2.335 and must be rejected as outside the scope of this proceeding.

* * *

³⁹³ Petition at 116.

³⁹⁴ *Id.* at 116-17.

Accordingly, Proposed Contention 10 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

M. Proposed Contention 11 (Dry Transfer System) Is Inadmissible

Proposed Contention 11 states:

ISP's plan to not have a dry transfer system ("DTS") or other technological means of handling problems with damaged, leaking or externally contaminated SNF canisters or damaged fuel in the canisters at the WCS site, from the date of commencement of operations, contradicts the expectations of the Continued Storage GEIS, and the unanalyzed risks, and increased possibilities of minor to severe radiological accidents must be addressed in the Environmental Impact Statement. There is no plan for radiation emissions mitigation or radioactive releases at the CISF site. These refusals to contingently prepare for radiological problems at the site are a byproduct of ISP's "start clean/stay clean" policy, are unrealistic and must be addressed in the EIS as well as in licensing conditions.³⁹⁵

Petitioners allege that "[f]ailure to have a functioning DTS from inception of operations at the WCS site violates the Atomic Energy Act obligation to protect the public."³⁹⁶ Petitioners also allege that the potential to store high-burnup fuel at the WCS CISF and "inherent dangers arising from the handling and transfer of spent nuclear fuel" require a DTS and radiation mitigation plan.³⁹⁷ Proposed Contention 11 references the reports of Robert Alvarez, who alleges specific problems with cladding failure associated with the storage of high-burnup fuel,³⁹⁸ and Gordon Thompson, who alleges that SNF will be damaged en route to the WCS

³⁹⁵ *Id.* at 118.

³⁹⁶ *Id.* at 119.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 120-21.

CISF or will be damaged during storage at the WCS CISF and will have to be repackaged at the WCS CISF before it is shipped to a repository.³⁹⁹

Proposed Contention 11 is inadmissible for multiple reasons. First, to the extent Petitioners claim the absence of a DTS or other plan to handle potentially damaged fuel somehow contradicts the expectations of the CSR, Petitioners' concerns are unsupported and an inadmissible challenge to NRC regulations. Second, Petitioners' concerns about the alleged need to repackage SNF at the WCS CISF prior to shipment to a repository are based solely on speculation and are outside the scope of the proceeding, as discussed above in ISP's response to Proposed Contention 4.⁴⁰⁰ Third, ISP's "start clean/stay clean" policy and plans for the operation of the WCS CISF fully address Petitioners' concerns, and Petitioners offer no substantive challenges to those plans. Petitioners have not adequately supported their argument that a DTS or other mitigation plans must be in place to repair dry storage systems or handle damaged SNF.⁴⁰¹ For all of these reasons, Proposed Contention 11 should be rejected pursuant to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

1. Proposed Contention 11 Is an Impermissible Challenge to the CSR

Petitioners argue that ISP's failure to include a DTS system in the design of the WCS CISF somehow "contradicts the expectations of the Continued Storage GEIS," NUREG-2157.⁴⁰² The CSR GEIS assumes that SNF canisters and casks stored at an away-from-reactor ISFSI such as the WCS CISF may have to be replaced approximately once every 100 years.⁴⁰³ To perform

³⁹⁹ *Id.* at 122-25.

⁴⁰⁰ *See supra* § IV.F.

⁴⁰¹ ISP's response to Proposed Contention 12 also addresses these issues, and is incorporated by reference here. *See infra* § IV.N.

⁴⁰² Petition at 118.

⁴⁰³ NUREG-2157 § 1.8.3.

this repackaging, the CSR GEIS assumes that a DTS will be available at that time.⁴⁰⁴ But the NRC assumes that repackaging requiring use of a DTS will only occur during the “long-term and indefinite storage timeframes,” *i.e.*, the term of storage beginning 160 years after the expiration of the term of the license.⁴⁰⁵ And pursuant to the CSR, ISP is not required to consider such impacts in its ER as they would occur well after the period of the requested CISF license. To the extent Petitioners assert otherwise, Proposed Contention 11 is inadmissible for the same reasons as Proposed Contention 10, namely as an inadmissible collateral attack on the CSR, and therefore should be dismissed pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

2. Petitioners’ Concerns About the Need to Repackage SNF Are Outside the Scope of This Proceeding

Petitioners also allege that a DTS is required at the WCS CISF because of the alleged need to repackage fuel at the CISF for future disposal at a repository.⁴⁰⁶ Petitioners rely upon the report of Mr. Alvarez who alleges that the current dry canister storage systems used by NRC licensees are not licensed for disposal and that fuel will need to be packaged into smaller canisters.⁴⁰⁷ But, as discussed above in ISP’s response to Proposed Contention 4,⁴⁰⁸ ISP is not seeking a license for a repository and is not pursuing approval to conduct repackaging operations at the WCS CISF. Petitioners’ concerns relating to the need for repackaging SNF to accommodate disposal in a repository are outside the scope of this proceeding. Thus, Petitioners’ arguments in Proposed Contention 11 that a DTS is necessary to support such repackaging at the WCS CISF should be rejected pursuant to 10 C.F.R. § 2.309(f)(1)(iii).

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ Petition at 121.

⁴⁰⁷ *Id.* (relying on Alvarez Report at 6-7).

⁴⁰⁸ *See supra* § IV.F.

3. ISP Will Implement a “Start Clean/Stay Clean” Policy at the WCS CISF that Fully Addresses Petitioners’ Concerns

Petitioners also assert that the Application’s plan to operate a “start clean/stay clean facility” without including a DTS in the proposed design of the WCS CISF is unrealistic. Therefore, according to Petitioners, the ER is inadequate because it fails to describe the potential impacts from radiological accidents.⁴⁰⁹

Petitioners have the burden to present facts supporting admissibility of their contention.⁴¹⁰ Petitioners thus are required to present facts or expert testimony suggesting how ISP’s “Start Clean/Stay Clean” philosophy could not be implemented to monitor for potential damage to dry canister storage systems or SNF that would require a DTS or radiation mitigation plan. Petitioners have not suggested any credible scenario through which the WCS CISF would receive damaged or leaking canisters or fuel or canisters would become damaged during storage at the WCS CISF. Proposed Contention 11 therefore is unsupported and fails to raise a genuine dispute with the Application and must be rejected.

a. *Petitioners Have Not Explained How ISP’s “Start Clean/Stay Clean” Cannot Be Implemented*

First, ISP’s “start clean/stay clean” policy is fully described in ISP’s response to Proposed Contention 2, above.⁴¹¹ But as Petitioners acknowledge,⁴¹² ISP’s “start clean/stay clean” policy means that:

The facility is configured and will be operated as a ‘clean’ facility. All components of the facility including the transport casks and storage canisters are designed to minimize the potential for any contamination. Continual radiological survey throughout the life of

⁴⁰⁹ Petition at 118-19.

⁴¹⁰ *Palisades*, CLI-15-23, 82 NRC at 325.

⁴¹¹ *See supra* § IV.D.

⁴¹² Petition at 119.

the facility will be performed to identify any possible contamination and to verify that the facility remains clean.⁴¹³

Further, the Application states that “residual radioactive contamination is not anticipated at the WCS” because canisters will be surveyed and decontaminated at the generator facility prior to shipment to the WCS CISF, the canisters are *welded shut*, and the canisters will not be opened at the WCS CISF.⁴¹⁴

The SAR provides more details on how this policy will be implemented. Specifically, “ISP will verify that canisters shipped to the WCS CISF comply with the terms, conditions of use, and technical specifications of” the dry cask storage systems that will be deployed at the WCS CISF.⁴¹⁵ Once a canister arrives at the WCS CISF, ISP will inspect each canister by conducting an evacuated volume helium leak test “as [a] prudent measure[] to confirm that a canister remains able to perform its safety function.”⁴¹⁶ And the SAR explains that, while in storage, the canisters will be appropriately surveilled, in accordance with the WCS CISF technical specifications.⁴¹⁷

The SAR thus contains fulsome discussions of the process to inspect all dry cask storage systems prior to installation and during storage at the WCS CISF for each of the types of dry cask storage systems that will be utilized at the WCS CISF.⁴¹⁸ Petitioners do not dispute the SAR’s discussion of this process or suggest with any specificity how, despite this process,

⁴¹³ *Id.* (quoting Application at 2-1).

⁴¹⁴ Application at 2-1.

⁴¹⁵ SAR § 5.1.1; *see also id.* § 11.5 (providing discussion of method ISP will use to confirm compliance with regulatory requirements of systems loaded at originating facility).

⁴¹⁶ SAR § 5.1.3.1; *see also id.* § 7.2 (“[A] receipt inspection of the canisters is performed upon arrival at the WCS CISF, which includes a post-transport package evaluation . . .”).

⁴¹⁷ SAR § 5.1.3.2.

⁴¹⁸ *Id.* § 5.2.

canisters or fuel could arrive at the WCS CISF already damaged or become damaged during storage. Petitioners have therefore failed to specify how precisely the Application is deficient, or to adequately support any assertion that it is, in fact, deficient.⁴¹⁹

b. *Petitioners Have Failed to Credibly Explain How Fuel Will Become Damaged During Transport or Storage at the WCS CISF*

Petitioners rely upon the declaration of Dr. Gordon Thompson to argue that it is likely that SNF will become damaged in transport or during storage at the WCS CISF.⁴²⁰ Specifically, Dr. Thompson's declaration quotes the CSR GEIS which discusses the potential that "spent fuel degradation mechanisms could occur *during continued storage*."⁴²¹ Dr. Thompson then asserts, with no further explanation, that "[a] similar statement could be made in regard to damage to SNF containers."⁴²² But Dr. Thompson's conclusory statement, without any further support, is insufficient to make Proposed Contention 11 admissible.⁴²³ And the majority of Dr. Thompson's statements, including the discussion of SNF degradation mechanisms,⁴²⁴ about the likelihood of potential damage,⁴²⁵ and the potential breakdown of institutional controls,⁴²⁶ are focused on the CSR GEIS, which, as discussed above in ISP's response to Contention 10,⁴²⁷ relate to storage after the term of the ISFSI and are therefore outside the scope of this proceeding pursuant to 10 C.F.R. § 51.23. Indeed, any disagreement Dr. Thompson has with the CSR GEIS, which is

⁴¹⁹ *Millstone*, CLI-01-24, 54 NRC at 358.

⁴²⁰ Petition at 123 (citing Thompson Decl. at 6-7).

⁴²¹ Thompson Decl. at 7 (quoting CSR GEIS § 2.2.2.1) (emphasis added).

⁴²² *Id.*

⁴²³ *USEC*, CLI-06-10, 63 NRC at 472.

⁴²⁴ *See* Petition at 122-23 (citing Thompson Decl. at 6-7).

⁴²⁵ *See id.* at 123-26 (citing Thompson Decl. at 8, 17-19).

⁴²⁶ *See* Thompson Decl. at 5-6, 12-14, 26, 60.

⁴²⁷ *See supra* § IV.L.

codified by the CSR, amounts to an impermissible challenge to NRC regulations, and cannot be litigated here.⁴²⁸ Thus, Dr. Thompson has not explained with any specificity how storage for the term of the WCS CISF license is likely to cause damage to the container or the fuel within it requiring a DTS or other radiological remediation plans.

Dr. Thompson discusses the potential that fuel could be damaged from accidents, including aircraft crashes, or deliberate sabotage.⁴²⁹ But the NRC has determined that environmental impacts from aircraft crashes at a site must be considered in the ER only if the accidents or attacks are credible.⁴³⁰ As the Commission found in the *PFS* proceeding, a “beyond design basis event” such as an airplane crash is credible only if there is a one in a million chance of it occurring.⁴³¹ Petitioners and Dr. Thompson put forth no evidence suggesting that this probability threshold is met for the WCS CISF. Thus, Petitioners fail to raise a genuine dispute with the Application by claiming an aircraft accident would damage the WCS CISF.

Nor is there any need to consider the environmental impacts of purported sabotage events. First, as described fully in response to Proposed Contention 14 below,⁴³² no NEPA analysis of the potential environmental impacts of hypothetical acts of terrorism is required in this proceeding as a matter of law. Further, neither Petitioners nor Dr. Thompson present evidence of a credible sabotage event on the WCS CISF. The ISP security plan, discussed in Chapter 9 of the Application, is required by 10 C.F.R. § 73.51(b)(1) to provide “high assurance

⁴²⁸ 10 C.F.R. § 2.335.

⁴²⁹ See Petition at 124-25 (citing Thompson Decl. at 9-12 (discussing the impact of potential attacks or aircraft accidents on a dry canister storage system)).

⁴³⁰ *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 406 (2005) (citing 10 C.F.R. § 72.24(d)(2)).

⁴³¹ *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 265 (2001).

⁴³² See *infra* § IV.P.

that activities involving spent nuclear fuel and high-level radioactive waste do not constitute an unreasonable risk to public health and safety.” The ISP security plan is also required by 10 C.F.R. § 73.51(b)(2) to provide methods to “detect and assess unauthorized penetration of” the ISFSI security boundary and “provide timely communication to a designated response force” that would respond to an attack on the CISF.⁴³³ Dr. Thompson’s general and unsupported speculation that fuel could be damaged by an attack despite these security measures cannot support admission of Proposed Contention 11.⁴³⁴

Further, Petitioners suggest that fuel could be damaged at the WCS CISF site during storage because of concerns with the cladding integrity in high-burnup fuel.⁴³⁵ For support, Petitioners cite to Mr. Alvarez’s report that high-burnup fuel with burnup greater than 45 GWd/MTHM is not assured to remain undamaged during the term of the WCS CISF license, apparently alleging that such fuel could create a radiological risk that must be evaluated in the ER.⁴³⁶ But Mr. Alvarez admits that ISP has considered this potential damage and has proposed a license condition requiring “all fuel with assembly average burnup greater than 45 GWd/MTHM shall be canned inside the canister.”⁴³⁷ Mr. Alvarez’s report notes that large portions of such fuel at certain sites would be ineligible for storage at the WCS CISF, but Mr. Alvarez does not assert that ISP will store ineligible fuel contrary to this condition.⁴³⁸ In short then, Mr. Alvarez ‘s

⁴³³ 10 C.F.R. §§ 73.51(b)(2)(iii)-(iv).

⁴³⁴ *USEC*, CLI-06-10, 63 NRC at 472.

⁴³⁵ Petition at 120-21.

⁴³⁶ *Id.* at 120 (citing Alvarez Report at 5).

⁴³⁷ Alvarez Report at 5 (quoting Application, Attach. A at 2 (Proposed License Condition 9)).

⁴³⁸ Alvarez Report at 6 (“The decision to forgo double-shell containment of high burnup spent nuclear fuel indicates that this material is likely to be ‘stranded’ for decades . . .”).

report does not support any dispute with the Application that would require evaluation in the ER.⁴³⁹

In upholding dismissal of a contention similar to Proposed Contention 11 in the *PFS* proceeding, the Commission noted that the only way a canister could be damaged was if the canister left the originating reactor in a damaged condition, became damaged during transportation, or was damaged at the CISF.⁴⁴⁰ The Commission “has determined generically that accidental canister breach is not a credible scenario.”⁴⁴¹ And licensees loading fuel into a dry canister storage system are required to have in place and comply with a QA program, and would have to violate that program in loading a defective canister.⁴⁴² Therefore, the Commission found that the *PFS* contention failed to raise a genuine dispute because damage to a canister en route to the facility was not a credible scenario.⁴⁴³ Likewise, Petitioners here have not demonstrated that damage to the fuel during the term of storage at the CISF is credible or that fuel will arrive at the CISF damaged.

In short, Proposed Contention 11 fails to support its claims that ISP is required to address issues with postulated damaged dry cask storage canisters or explain how the ER is deficient for failing to describe potential impacts from damaged or leaking canisters received at the site.

⁴³⁹ Moreover, Mr. Alvarez’s concerns about the potential for fuel cladding to degrade does not raise a material dispute with ISP’s Application. As the Commission has explained, “once the fuel is loaded and sealed into the canister, the canister would adequately contain any radionuclides, and the fuel cladding was no longer a structure important to safety.” *PFS*, CLI-04-22, 60 NRC at 134 (citing *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-04-4, 59 NRC 31, 39 (2004); Proposed Rule, Licensing Requirements for the Independent Storage of Spent Nuclear Fuel and High Level Radioactive Waste,” 51 Fed. Reg. 19,106, 19,108 (May 27, 1986)).

⁴⁴⁰ *PFS*, CLI-04-22, 60 NRC at 136-37 (citing Final Rule, Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSI) and Monitored Retrievable Storage Facilities (MRS), 60 Fed. Reg. 32,430, 32,438 (June 22, 1995)).

⁴⁴¹ *PFS*, CLI-04-22, 60 NRC at 137.

⁴⁴² *Id.* at 138.

⁴⁴³ *Id.*

Proposed Contention 11 should thus be rejected pursuant to 10 C.F.R. §§ 2.309(f)(1)(iii) and (vi).

* * *

Accordingly, Proposed Contention 12 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iii), (v), and (vi).

N. Proposed Contention 12 (Continued Storage Rule) Is Inadmissible

Proposed Contention 12 states:

The proposed WCS CISF does not qualify for the exclusions from NEPA scrutiny conferred by the Waste Storage GEIS. Consideration of severe accidents, Environmental Justice, terrorism and sabotage and related mitigation in the transportation and operations elements of the ISP/WCS CISF plan may not be treated as generic issues and excused from consideration under NEPA.⁴⁴⁴

Petitioners contend that the generic impact findings of the CSR (10 C.F.R. § 51.23) and supporting CSR GEIS (NUREG-2157) do not apply to the WCS CISF, such that ISP must conduct a site-specific environmental impact analysis.⁴⁴⁵ Proposed Contention 12 is inadmissible for the reasons set forth below.⁴⁴⁶ In short, the contention raises issues that are outside the scope of the proceeding, lacks materiality, lacks adequate factual or legal support, and fails to establish a genuine dispute with the Application on a material issue of law or fact, contrary to the requirements of 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

⁴⁴⁴ Petition at 127.

⁴⁴⁵ *Id.*

⁴⁴⁶ ISP's response to Proposed Contention 11 also addresses these issues, and is incorporated by reference here. *See supra* § IV.M.

1. Proposed Contention 12 Inappropriately Challenges the CSR and CSR GEIS Insofar as It Suggests That They Do Not Apply to the Storage of SNF at the WCS CISF During the “Continued Storage” Timeframe

Petitioners make the broad-brush statement that “10 C.F.R. § 51.23(c) takes facilities such as WCS outside the Continued Storage Rule.”⁴⁴⁷ However, Petitioners’ assertion relies on an unsupported and inaccurate reading of the regulations. Section 51.23(c) states that “[t]his section does not alter any requirements to consider the environmental impacts of spent fuel storage *during the term of a reactor operating license or combined license, or a license for an ISFSI in a licensing proceeding.*”⁴⁴⁸ As discussed further below, Section 51.23(c) provides that the generic impact findings of the CSR and supporting CSR GEIS do not apply to a proposed CISF’s initial license term (40 years in this case), such that a site-specific environmental impacts analysis is required for that license term. However, the CSR and CSR GEIS findings do apply to the *continued storage* of SNF after the end of the facility’s license term.⁴⁴⁹ As the NRC Staff clearly explained in the GEIS:

If an applicant submits a request to the NRC to license a [CISF], then the NRC’s review of that application would include an appropriate environmental review. In the only example of such a request, for the Private Fuel Storage Facility (PFSF), the NRC prepared and published an EIS. Further, as clarified in the *Federal Register* Notice for the Rule (78 FR 56776), an applicant for an away-from-reactor storage facility would not be able to rely on the GEIS or the Rule to avoid the consideration of the environmental impacts of constructing and operating that away-from-reactor storage facility. *The analysis in this GEIS would only apply to any*

⁴⁴⁷ Petition at 133.

⁴⁴⁸ Emphasis added.

⁴⁴⁹ In the CSR GEIS, the NRC analyzed three timeframes that represent various scenarios for the length of time that *continued* SNF storage may be needed: (1) the short-term timeframe, which analyzes 60 years of continued storage after the end of a reactor’s licensed life for operation; (2) the long-term timeframe, which analyzes the environmental impacts of continued storage for 160 years after the end of a reactor’s licensed life for operation; and (3) an indefinite timeframe, “which assumes that a repository never becomes available.” Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. at 56,245.

*necessary environmental analysis of the environmental impacts of storing the spent fuel after the end of the facility's license term.*⁴⁵⁰

Thus, to the extent Proposed Contention 12 asserts that the CSR and CSR GEIS have no applicability to the WCS CISF, or raises issues related to the environmental impacts of continued storage of SNF at the WCS CISF after the end of the facility's license term, it impermissibly challenges the CSR and CSR GEIS. In these circumstances, Petitioners' failure to submit a waiver petition pursuant to 10 C.F.R. § 2.335(b) renders the contention outside the scope of this proceeding, contrary to the requirement of 10 C.F.R. § 2.309(f)(1)(iii).

2. Proposed Contention 12 Fails to Raise a Genuine Material Dispute Because, Consistent with the CSR and CSR GEIS, the ER Provides a Site-Specific Environmental Impacts Analysis That Petitioners Fail to Challenge

Insofar as Petitioners assert that the ER must provide a site-specific analysis for impacts during the term of the proposed CISF license, they fail to raise a genuine material dispute with the ER, which provided such an analysis. Indeed, as the foregoing discussion suggests, Petitioners fundamentally misunderstand the purpose and scope of the CSR and CSR GEIS and how they apply or relate to ISP's site-specific ER.⁴⁵¹

In the Statement of Considerations ("SOC") for the 2014 CSR, the Commission specifically addressed the relationship between the new rule (and CSR GEIS) and the licensing of prospective away-from-reactor ISFSIs. The Commission stated, in pertinent part:

The GEIS and rule do not satisfy the NRC's obligations under NEPA to analyze the environmental impacts of spent fuel storage during the term of a facility's license. ***The NRC must conduct a site-specific environmental analysis to support the licensing of any***

⁴⁵⁰ GEIS, vol. 2, app. D at D-66 (emphasis added).

⁴⁵¹ The NRC revised 10 C.F.R. § 51.23(a) to reflect the environmental impact determinations of the CSR GEIS (NUREG-2157). Section 51.23(a) provides that the Commission has generically determined that the environmental impacts of continued storage of SNF beyond the licensed life for operation of a reactor are those impacts identified in NUREG-2157. The NRC stated that it will use the impact determinations in NUREG-2157 to inform the decision-makers in licensing proceedings of the impacts of continued storage. *See Continued Storage of Spent Nuclear Fuel; Final Rule, 79 Fed. Reg. 56,238, 56,249 (Sept. 19, 2014).*

*future away-from-reactor ISFSI. The NRC cannot use the rule and GEIS as a substitute for the environmental analysis associated with constructing and operating an away-from-reactor ISFSI. The site-specific NEPA analysis for an away-from-reactor ISFSI can only rely on the analysis in the GEIS and the requirements in the rule to satisfy the NRC’s NEPA obligations with respect to the storage of spent fuel during the applicable continued storage period.*⁴⁵²

Thus, as explained above, while the CSR allows an ER to omit discussion of the environmental impacts of SNF storage in an ISFSI for the period *following the term* of the ISFSI license, it “does not alter any requirements to consider the environmental impacts of spent fuel storage during the term of . . . a license for an ISFSI in a licensing proceeding.”⁴⁵³ Therefore, an away-from-reactor ISFSI license applicant (like ISP) must provide a site-specific analysis of environmental impacts arising during the term of the proposed license.

ER Chapter 4 provides the required site-specific analysis for the term of the license. It evaluates the potential site-specific non-radiological and radiological environmental impacts associated with the construction, operation, and decommissioning of the proposed CISF.⁴⁵⁴ Specifically, the ER evaluates the impacts for storage of 40,000 Metric Tons of Uranium (“MTUs”) of SNF (the same capacity as the proposed PFS facility licensed by the NRC in 2006) and the generic facility analyzed in the CSR GEIS.⁴⁵⁵ Thus, the ER does in fact analyze

⁴⁵² Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. at 56,243 (emphasis added). The rulemaking notes that the away-from-reactor environmental impacts analyzed in the CSR GEIS include the impacts from *constructing* the ISFSI. *Id.* at 56,245. Although an away-from-reactor ISFSI would be subject to a site-specific licensing review that includes an EIS that would assess the environmental impacts due to construction, the impacts due to construction were included in the CSR GEIS due to the potential for that construction to occur during the timeframes analyzed in the CSR GEIS. *Id.*

⁴⁵³ 10 C.F.R. § 51.23(c).

⁴⁵⁴ ER Chapter 4 is divided into sections that assess the impact to each resource described in Chapter 3 (“Description of the Affected Area”). Those ER sections include: land use (4.1), transportation (4.2), geology and soils (4.3), water resources (4.4), ecological resources (4.5), air quality (4.6), noise (4.7), historic and cultural resources (4.8), visual and scenic resources (4.9), socioeconomics (4.10), environmental justice (4.11), public and occupational health (4.12), and waste management (4.13).

⁴⁵⁵ ISP is currently requesting authorization to possess and store 5,000 MTUs, which includes a small quantity of mixed oxide fuel, and related GTCC waste. If the requested license is issued by the NRC, then ISP anticipates subsequently requesting amendments to the license to request authorization to possess and store

operational and SNF transportation-related impacts (under normal and accident conditions) and EJ considerations.⁴⁵⁶

ER Chapter 5 discusses potential mitigation measures that could reduce adverse impacts that could occur during construction, routine, and non-routine operation of the WCS CISF. Additionally, Section 8.3 discusses how ISP's site-specific impact findings for the WCS CISF compare to impact findings contained in the CSR GEIS for an away-from-reactor storage facility. Petitioners do not challenge the information, analyses, or conclusions presented in those ER sections. As discussed below, they also fail to explain how the ER "contradicts" the CSR GEIS in any material respect. Thus, Proposed Contention 12 fails to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

3. Petitioners' Other Miscellaneous Supporting Arguments Raise Issues That Are Outside of the Proceeding's Scope, Lack Materiality, and Lack Any Legal or Factual Basis

Petitioners make several ancillary arguments in support of their claim that the CSR GEIS does not apply to the proposed WCS CISF. Those arguments raise issues that are outside the scope of the proceeding, are immaterial to the NRC Staff's required findings on the Application, and lack adequate legal or factual bases. As such, they fail to meet the requirements of 10 C.F.R. §§ 2.309(f)(1)(iii)-(v) and do not support the admission of Proposed Contention 12.

Petitioners first claim that ISP cannot rely on the generic determinations in the CSR GEIS because the CISF is not legally authorized.⁴⁵⁷ That argument contravenes controlling precedent

an additional 5,000 MTUs of SNF for each of seven subsequent expansion phases to be completed over the course of 20 years. Ultimately, ISP anticipates that 40,000 MTUs of SNF and related GTCC waste would be stored at the CISF upon completion of all eight phases. Therefore, the ER analyzes the environmental impacts of possession and storage of 40,000 MTUs of SNF and related GTCC waste. *See* ER at 1-1.

⁴⁵⁶ As discussed in response to Proposed Contention 14, *see infra* § IV.P, NEPA and Part 51 do not require consideration of terrorism and sabotage in the ER for the proposed WCS CISF.

⁴⁵⁷ Petition at 127-28.

holding that the NRC has the authority to license an off-site ISFSI under Part 72, and that the NWPA neither implicitly repeals nor supersedes that authority. In the *PFS* proceeding (in which the NRC issued a Part 72 license for a proposed CISF), the Commission concluded that Congress, “in enacting the [AEA], gave the NRC authority to license privately owned, away-from-reactor (AFR) facilities.”⁴⁵⁸ It held that “[n]othing in the text or legislative history of the NWPA suggests that Congress intended to alter this authority when it enacted the NWPA, which is primarily concerned with the responsibilities and duties of federal agencies with respect to spent fuel storage and disposal.”⁴⁵⁹ Moreover, the D.C. Circuit reached the same conclusion in a decision stemming from the *PFS* proceeding.⁴⁶⁰ In *Bullcreek*, the court cited “the NRC’s authority under the [AEA] to license private away-from-reactor storage facilities,”⁴⁶¹ and concluded that because “[t]he NRC’s authority . . . to license private generators to store spent nuclear fuel originated with the AEA, . . . the NWPA’s failure to ‘authorize’ storage at private facilities had no effect on this preexisting authority.”⁴⁶²

Petitioners also claim that ISP cannot rely on the CSR because of alleged differences between the WCS CISF design and the away-from-reactor facility design assumptions used in the CSR GEIS.⁴⁶³ They principally argue that the CSR GEIS assumes that an away-from-reactor

⁴⁵⁸ *PFS*, CLI-02-29, 56 NRC at 392.

⁴⁵⁹ *Id.* at 411 (emphasis added). “There is no irreconcilable conflict between a law imposing one set of restrictions on federal facilities (the NWPA), and another law imposing a different set of restrictions on private facilities (Part 72).” *Id.* at 403.

⁴⁶⁰ *See generally Bullcreek*, 359 F.3d 536.

⁴⁶¹ *Id.* at 537-38.

⁴⁶² *Id.* at 539. Indeed, the NRC promulgated its Part 72 regulations governing the licensing of ISFSIs (both at-reactor and away-from-reactor) two years before Congress enacted the NWPA. *Id.* at 538, 543. Moreover, the NRC already has licensed several privately owned, away-from-reactor facilities—both before and after the NWPA’s enactment. *See, e.g.*, NRC License No. SNM-2513 (Private Fuel Storage); NRC License No. SNM-2500 (GE-Morris); NRC License No. SNM-2504 (Ft. St. Vrain); NRC License No. SNM-2508 (TMI-2 ISFSI); NRC License No. SNM-2512 (Idaho Spent Fuel Facility).

⁴⁶³ *See* Petition at 128-31.

ISFSI will have a dry transfer system (“DTS”), which they contend is needed to repackage any “seriously leaky, cracked, or externally contaminated” SNF canisters that arrive at CISF, whereas ISP’s proposal does not include a DTS.⁴⁶⁴ Petitioners’ arguments on this point are factually unfounded and, to the extent they concern the environmental impacts of SNF following the end of the WCS CISF’s license term (*i.e.*, during the continued storage timeframe), they collaterally attack the findings of the CSR and CSR GEIS, contrary to 10 C.F.R. § 2.335(a).

First, Petitioners provide no basis for their apparent *assumption* that SNF canisters received at the WCS CISF will contain “serious” leaks, cracks, or external contamination. Nor do the various SAR statements quoted by Petitioners⁴⁶⁵ support the claim ISP will lack the capability to handle such damaged or contaminated canisters. Those SAR statements indicate only that the WCS CISF design does not include bare fuel handling facilities or spent fuel pools.⁴⁶⁶ Notably, the third statement quoted by Petitioners refers to the “*unlikely* loss of confinement.”⁴⁶⁷ None of these statements demonstrates that ISP is likely to receive damaged SNF canisters or that it will lack the ability to appropriately respond to such canisters should they be sent to the proposed WCS CISF.⁴⁶⁸

In addition, Petitioners’ claim that a DTS is needed to enable “retrieval of spent fuel for inspection or repackaging” or repair of canisters is unfounded.⁴⁶⁹ Petitioners base their assertion

⁴⁶⁴ *Id.* at 128-29.

⁴⁶⁵ *Id.*

⁴⁶⁶ *See id.* (quoting SAR at 1-2, 1-5, 3-20, and 6-1).

⁴⁶⁷ *See id.* at 128 (quoting SAR at 3-20) (“A recovery method for the *unlikely* loss of confinement event is *independent* of any bare fuel handling facilities.”) (emphasis added).

⁴⁶⁸ Similarly, the ER’s statement that NRC-approved SNF storage systems are “engineered to safely store spent fuel for 50 years or longer, and that “this time can be extended almost indefinitely through rigorous inspections, aging management programs, maintenance, and re-licensing” in no way “contradicts” or “departs from” the CSR GEIS, as claimed by Petitioners. *See* ER at 2-5.

⁴⁶⁹ Petition at 129-30.

in part on a video of Holtec’s CEO, Dr. Kris Singh, but incorrectly characterize Dr. Singh’s statements.⁴⁷⁰ In the video, Dr. Singh expresses his opinion that it is impractical to repair a canister, but he does not claim that canisters cannot be inspected or repackaged (or that a repair is impossible).⁴⁷¹ Significantly, the CSR GEIS assumed that a DTS would be available at an away-from-reactor ISFSI *when necessary*, and notes that such necessity “will increase as the duration and quantity of fuel in dry storage increases.”⁴⁷² The CSR GEIS does not require that a DTS be built. Indeed, it recognizes that a “separate licensing action would be necessary before a licensee may construct and operate a site-specific DTS.”⁴⁷³ The NRC nevertheless included the environmental impacts of constructing a reference DTS “to provide a complete picture of the environmental impacts of continued storage.”⁴⁷⁴

Finally, Petitioners assert that “ISP/WCS has clearly stated that Federal funding from DOE is a core necessity of the construction, operation and decommissioning of the CISF, whereas Private Fuel Storage, the prototype for the CSR GEIS, was intended to operate based on funds collected from ratepayers through utility bills and direct payments by utilities.”⁴⁷⁵ They claim that this purported reliance on Federal funding “creates an issue of fact” because it

⁴⁷⁰ *Id.* at 131 (citing <https://youtu.be/euaFZt0YPi4>).

⁴⁷¹ DTS is also not required to inspect a canister. It would be used to handle the transfer of spent fuel. *See* NUREG-2157 at 1-3, 5-4.

⁴⁷² *Id.* at 2-20 (emphasis added).

⁴⁷³ *Id.* at 2-23.

⁴⁷⁴ *Id.* The CSR GEIS assumes that a DTS would be built during the long-term storage timeframe (*i.e.*, 160 years after the licensed life for reactor operations). It notes that “[a] licensee would have to request authorization from the NRC to build and operate the DTS, either during initial licensing of the ISFSI, or as a later, separate action. As part of its review of such a request, the NRC would have to consider any associated environmental impacts under 10 CFR Part 51.” NUREG-2157 at 5-4 n.2. ISP has not requested authorization from the NRC to build a DTS during the WCS CISF’s initial 40-year license term. NRC regulations and the CSR GEIS do not require otherwise.

⁴⁷⁵ Petition at 133-34.

“sharply diverges” from the CSR GEIS’s PFS prototype and “involves a funding stream from DOE for which there is no federal statutory authorization.”⁴⁷⁶

This argument is patently flawed. First, Petitioners do not explain how ISP’s proposed financial assurance methods (which are intended to comply with NRC requirements in Part 72 and are discussed in Sections 1.6 and 1.7 of the Application) are relevant to their NEPA-based claim that ISP must conduct site-specific environmental impact analysis. Second, Petitioners’ claim that Federal funding from DOE is a “core necessity” is factually inaccurate. In short, as explained in the response to Proposed Contention 3 above,⁴⁷⁷ the Application explains how ISP intends to provide adequate financial assurance for the construction, operation, and decommissioning of the WCS CISF through contracts with SNF Title Holders in the event that it is not able to obtain such funding through a contract(s) with DOE.⁴⁷⁸ Therefore, Petitioners’ “financing mechanism” argument lacks relevance, materiality, and factual support.

* * *

Accordingly, Proposed Contention 12 should be rejected for failure to satisfy the requirements in 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

O. Proposed Contention 13 (Reprocessing) Is Inadmissible

Proposed Contention 13 states:

The WCS CISF, by aggregating SNF in west Texas, would provide a stockpile of spent fuel for purposes of reprocessing. The return of spent fuel reprocessing is supported by the Texas Commission on Environmental Quality. The radioactively dangerous industrial activity of reprocessing must be addressed, analyzed and disclosed

⁴⁷⁶ *Id.* at 134.

⁴⁷⁷ *See infra* § IV.E.

⁴⁷⁸ *See generally* Application at 1-4 to 1-9 (discussing financial qualifications and financial assurance as well as related license conditions and exemption requests).

in a discussion of cumulative environmental impacts of the SNF waste storage project.⁴⁷⁹

As a preliminary matter, Proposed Contention 13 fails to allege any omission or insufficiency *in the ER*, or identify any requirement in 10 C.F.R. Part 51 pertaining to applicant ERs that purportedly has not been satisfied. Rather, Proposed Contention 13 focuses on what allegedly must be included in the NRC’s future EIS. For this reason alone, Proposed Contention 13 should be summarily rejected for failing to demonstrate a genuine dispute with the *Application*, contrary to 10 C.F.R. §§ 2.309(f)(1)(vi) and (f)(2).

Overlooking this obvious flaw *arguendo*, Petitioners’ general complaint still fails to demonstrate an admissible contention. Petitioners claim that reprocessing activities are so “likely” as to require consideration “under NEPA as a cumulative impact of the WCS CISF development.”⁴⁸⁰ Petitioners further make the dubious claim that the WCS CISF is intended to “provide a stockpile of spent fuel *for purposes of* reprocessing.”⁴⁸¹ But Petitioners cite no support for this assertion, which is baseless. Moreover, reprocessing can hardly be viewed as a “reasonably foreseeable future action”⁴⁸² because, as noted in an attachment to the ER, “the reprocessing option is not available in the U.S.”⁴⁸³ Even assuming this practical reality *could* change in the future, Petitioners identify no pending proposals for reprocessing facilities. Nor are there any. As explained further below, the absence of pending proposals is *per se* dispositive to Petitioners’ assertion that such non-existent proposals must be considered “reasonably

⁴⁷⁹ Petition at 134-35.

⁴⁸⁰ *Id.* at 138.

⁴⁸¹ *Id.* at 134-35 (emphasis added).

⁴⁸² 40 C.F.R. § 1508.7; 10 C.F.R. § 51.14(b) (adopting CEQ’s definition in 40 C.F.R. § 1508.7).

⁴⁸³ ER, Attach. 1-2, TCEQ, “Assessment of Texas’s High Level Radioactive Waste Storage Options” at 10 (Mar. 2014).

foreseeable,” and therefore included in a cumulative impacts analysis. Thus, Proposed Contention 13 also is immaterial and unsupported and should be rejected as contrary to 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

1. Petitioners Fail to Dispute the Application

As noted above, the proposed contention is pled in speculative terms of what purportedly must be included in the NRC’s future EIS. For example, the statement of the contention, itself, alleges that reprocessing must be considered in the “EIS.”⁴⁸⁴ And Petitioners’ discussion of applicable legal standards discusses only CEQ regulations and general NEPA case law, but fails entirely to identify any requirement in Part 51 that purportedly has not been satisfied by the Application. Petitioners fail to even acknowledge the ER’s discussion of cumulative impacts. For a contention to be admissible, it must—without exception—challenge the *Application*.⁴⁸⁵ On this basis alone, Proposed Contention 13 should be summarily rejected for failing to satisfy 10 C.F.R. § 2.309(f)(1)(vi).

2. Reprocessing Is Not “Reasonably Foreseeable”

Petitioners make the unsupported claim that reprocessing activities are so “likely” as to require consideration “under NEPA as a cumulative impact of the WCS CISF development.”⁴⁸⁶ As explained below, Petitioners’ assertion is supported by neither fact nor law. Thus, Proposed Contention 13 fails to identify adequate support, fails to identify a material issue, and therefore should be rejected as contrary to 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

⁴⁸⁴ Petition at 134.

⁴⁸⁵ To be admissible, a contention must contest “the pertinent portions of the license *application*” or “explain why the *application* is deficient.” Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,170 (emphasis added).

⁴⁸⁶ Petition at 138.

Petitioners correctly note that a cumulative impacts analysis must include “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,”⁴⁸⁷ but this requirement is not without limits. In *Kleppe v. Sierra Club*, the Supreme Court explained that an EIS need only discuss other related actions when those actions have been (1) formally proposed and (2) are pending before an agency.⁴⁸⁸ Specifically, the Supreme Court explained that NEPA “speaks solely in terms of Proposed actions; it does not require an agency to consider the possible environmental impacts of less imminent actions.”⁴⁸⁹ And the Commission agrees; it has held that projects that are “merely contemplated,” but not concrete or reasonably certain, need not be considered in a cumulative impacts analysis.⁴⁹⁰ Moreover, the Commission recently reaffirmed this holding, explaining that possible future actions must “be in a sufficiently advanced stage to be considered a ‘proposal’ for action that ‘bring[s] NEPA into play.’”⁴⁹¹

Contrary to the above requirements, Proposed Contention 13 fails to allege the existence of *any* reprocessing activity that either (1) has been formally proposed or (2) is pending before an agency. Rather, Petitioners attempt to support their claim that reprocessing is “reasonably foreseeable” by way of reference to three documents suggesting there may be some speculative commercial appetite or political support to reconsider current national policy on reprocessing activities. More specifically, Petitioners cite: a 2015 slide show given by the Eddy-Lea Energy

⁴⁸⁷ *Id.* at 140 (quoting 40 C.F.R. § 1508.7).

⁴⁸⁸ 427 U.S. 390, 410 (1976).

⁴⁸⁹ *Id.* at 410 n.20.

⁴⁹⁰ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-14, 55 NRC 278, 295 (2002).

⁴⁹¹ *Strata Energy, Inc.* (Ross In Situ Recovery Uranium Project), CLI-16-13, 83 NRC 566, 577 (2016) (quoting *McGuire/Catawba*, CLI-02-14, 55 NRC at 295).

Alliance to the New Mexico State Legislature;⁴⁹² a 2017 newspaper article;⁴⁹³ and a 2008 “Draft Global Nuclear Energy Partnership Programmatic Environmental Impact Statement” completed by DOE.⁴⁹⁴ At best, these documents offer speculation about the potential for (or benefits of) future reprocessing activities, but otherwise fail to identify any pending proposal for a reprocessing facility that would meet the Supreme Court’s (or the Commission’s) standard for reasonable foreseeability.

Because Petitioners have failed to provide adequate support to demonstrate that a speculative future reprocessing facility is “reasonably foreseeable,” and therefore must be evaluated in a cumulative impacts analysis, they also have failed to identify a genuine dispute on a material issue of law or fact.

* * *

Accordingly, Proposed Contention 13 should be rejected for failure to satisfy 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

P. Proposed Contention 14 (Security Risk) Is Inadmissible

Proposed Contention 14 states:

The NRC should, under NEPA, consider the risks, impacts and safety/security arrangements for the ISP/WCS CIFS SNF transportation effort, given the long historical record and experience

⁴⁹² Petition at 135 (citing to J. Heaton, Chairman ELEA, LLC, Slides, “A Centralized Interim Storage Facility for Used Nuclear Fuel” at 4 (undated), <https://www.nmlegis.gov/handouts/RHMC%20080216%20Item%205%20Interim%20Storage--Eddy-Lea%20County%20Alliance.pdf>) (merely noting that a CIFS “[p]rovides the most flexibility for recycling, research, and disposal”).

⁴⁹³ *Id.* (citing Ralph Vartabedian, *1,800 Tons of Radioactive Waste Has an Ocean View and Nowhere to Go*, LA TIMES (Jul. 2, 2017, 3:00 AM), <http://www.latimes.com/local/california/la-me-stranded-nuclear-waste-20170702-htmstory.html>) (quoting a local official in New Mexico for the proposition that he may support reprocessing activities).

⁴⁹⁴ *Id.* (citing DOE, “Draft Global Nuclear Energy Partnership Programmatic Environmental Impact Statement (GNEP PEIS; DOE/DIS-0396),” (Oct. 2008), https://www.energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/EIS-0396-DEIS-2008.pdf) (noting that the document represents a “first step” in even considering “whether” to permit reprocessing activities, and stating explicitly that “DOE is not proposing project-specific or site-specific actions”).

derived from research and litigation over the proposed Yucca Mountain geologic facility. There is a constantly-changing threat environment that radiological shipments to waste storage facilities such as ISP/WCS and a consequent need to plan for an evolving variety of design-basis threats (DBTs) and beyond-design-basis-events (BDBE). In-transit risks are a central part of the equation and need to be addressed. To “stock” the ISP CISO with SNF and GTCC wastes, the materials must be transported there, and the lack of details on waste conveyance in the WCS Environmental Report belies the centrality of transportation to the implementation of the project.⁴⁹⁵

Proposed Contention 14 comprises 25 wide-ranging “sub-contentions.”⁴⁹⁶ Petitioners’ arguments appear to converge on one principal claim: ISP must analyze, under NEPA, “the range of environmental impacts likely to result in the event of a terrorist attack on both the WCS CISO and upon in-transit deliveries of SNF and GTCC waste.”⁴⁹⁷ According to Petitioners, ISP’s alleged failure to analyze and discuss human-induced event (“HIE”) risks, terrorism, and sabotage in the ER “must be addressed and remedied as a matter of law.”⁴⁹⁸ For the reasons explained below, Proposed Contention 14 is inadmissible because it fails to meet any of the contention admissibility requirements in 10 C.F.R. §§ 2.309(f)(1)(i)-(vi).

1. Proposed Contention 14 Lacks Sufficient Specificity and a Concise Statement of Its Purported Legal or Factual Bases

As an initial matter, Petitioners do not provide a “specific statement of the issue of law or fact to be raised or controverted” and a “brief explanation of the basis for the contention,” contrary to requirements of 10 C.F.R. §§ 2.309(f)(1)(i) and (ii). Under NRC rules, petitioners “must articulate at the outset the *specific* issues they wish to litigate as a prerequisite to gaining

⁴⁹⁵ Petition at 142.

⁴⁹⁶ *See id.* at 142-59.

⁴⁹⁷ *Id.* at 151-52.

⁴⁹⁸ *Id.* at 148.

formal admission as parties.”⁴⁹⁹ In addition, supporting information for a proposed contention “must be specifically identified [and] a petitioner ‘may not simply incorporate massive documents by reference as the basis for or as a statement of his contentions.’”⁵⁰⁰ The purpose of these longstanding procedural requirements is to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”⁵⁰¹

Petitioners’ unwieldy and disjointed Proposed Contention 14 fails to meet even these threshold pleading requirements, as it comprises 17 pages of text and numerous unrelated “sub-contentions” and only vaguely “bring[s] to the notice of the NRC” Dr. James Ballard’s 70-page report and two declarations authored by Dr. Gordon Thompson.⁵⁰² Moreover, the 25 sub-contentions present a litany of issues that are unrelated to terrorism—the putative subject of Proposed Contention 14—including such topics as title to waste, reprocessing, first responder protocols, precise transportation routes, and defense wastes, among others. The sub-contentions, in effect, represent Dr. Ballard’s personal “wish list” of “additional areas of analysis under NEPA” rather than concrete issues that are appropriate for adjudication.⁵⁰³

⁴⁹⁹ *Oconee*, CLI-99-11, 49 NRC at 338 (emphasis added).

⁵⁰⁰ *Millstone*, LBP-04-15, 60 NRC at 95 (quoting *Pub. Serv. Co. of N.H. et al.* (Seabrook Station, Units 1 & 2), CLI-89-3, 29 NRC 234, 240-41 (1989)).

⁵⁰¹ Changes to Adjudicatory Process, 69 Fed. Reg. at 2202. See also *Crow Butte Res., Inc.* (In Situ Leach Facility, Crawford, Nebraska), LBP-15-15, 81 NRC 598, 601 (2015).

⁵⁰² Petition at 143 (citing James David Ballard, Ph.D., “Interim Storage Partners: Transportation of the Inventory and the Storage of Highly Radioactive Waste Material” (Oct. 2018) (“Ballard Report”); Declaration and *Curriculum Vitae* of Gordon Thompson (Nov. 13, 2018) (“Thompson 2018 Declaration”); Gordon R. Thompson, Declaration, “Comments on the US Nuclear Regulatory Commission’s Waste Confidence Generic Environmental Impact Statement, Draft Report for Comment (September 2013) (Dec. 19, 2013) (“Thompson 2013 Declaration”).

⁵⁰³ Petition at 152.

In view of the above, Proposed Contention 14 should be rejected as inadmissible on these grounds alone.⁵⁰⁴ Petitioners have not pled their proposed contention and associated bases with the specificity and conciseness required by Section 2.309(f)(1)(i) and (ii).

2. Proposed Contention 14 Raises Numerous Issues, Including Concerns About Terrorism-Related Environmental Impacts, That Are Not Within the Scope of This Proceeding or Material to the NRC Staff's NEPA Review

As the foregoing discussion suggests, the issues raised in Proposed Contention 14 also generally fall outside the scope of this proceeding and lack any material nexus to the NRC Staff's required environmental or safety findings on the WCS CISF Application. Therefore, the proposed contention also is inadmissible under 10 C.F.R. §§ 2.309(f)(1)(iii) and (iv). To the extent ISP can discern any unifying issue or theme from Proposed Contention 14 or the Ballard Report and Thompson Declarations referenced therein, it appears to be Petitioners' view that terrorist attacks must be addressed in the NRC's *environmental* review process.⁵⁰⁵ Indeed, as noted above, Petitioners expressly seek an analysis of the environmental impacts likely to result from a terrorist attack on the WCS CISF and SNF and GTCC waste shipments.⁵⁰⁶ However, controlling Commission and judicial precedent holds that NEPA does *not* require an analysis of environmental impacts from a hypothetical terrorist attack. Specifically, the Commission has held that NEPA does not require a terrorism review because the "environmental effect" of

⁵⁰⁴ See *Crow Butte Res., Inc.* (N. Trend Expansion Project), CLI-09-12, 69 NRC 535, 552 (2009) (noting that "contentions grounded on little more than guesswork would waste the scarce adjudicatory resources of all involved"); *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 6 & 7), LBP-17-2, 85 NRC 14, 31 (2017) (holding that "imprecision in a contention renders it impermissible pursuant to the specificity requirement in [10 C.F.R. §] 2.309(f)(1)(i)").

⁵⁰⁵ See, e.g., Petition at 143 ("There is no reference nor analysis in any of the application papers to the risks of terrorism and/or accident during the anticipated transportation of SNF/GTCC wastes"); *id.* at 143 n.67 (summarizing Dr. Ballard's terrorism-related credentials); *id.* at 147 ("Dr. Thompson hypothesizes that a terrorist or sabotage attack causing a Type IV release could include a cask fire involving two canisters of SNF that would cause a substantial release of radiation."); *id.* at 150 ("There is controversy over NEPA's applicability to terrorism and security measures.").

⁵⁰⁶ Petition at 152.

terrorism is too far attenuated from the NRC's licensing action for the NRC's licensing action to be the proximate cause of that impact.⁵⁰⁷

As Petitioners note, the Ninth Circuit decided in *San Luis Obispo Mothers for Peace v. NRC* that a terrorist attack is not so remote and speculative as to be beyond a NEPA analysis.⁵⁰⁸ However, as Petitioners omit, following that decision and the subsequent remand of the Diablo Canyon ISFSI licensing proceeding, the Commission determined that it would not apply the Ninth Circuit's ruling outside of that Circuit.⁵⁰⁹ The Commission reiterated that "NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities."⁵¹⁰ Among other things, it explained that the "environmental effect caused by third-party miscreants is . . . simply too far removed from the natural or expected consequences of agency action to require a study under NEPA," and the "claimed impact is too attenuated to find the proposed federal action to be the proximate cause of that impact."⁵¹¹ The proposed site for the WCS CISF is Andrews County, Texas,⁵¹² which is within the jurisdiction of

⁵⁰⁷ *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1, 6-7 (2003). *See also System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 145-47 (2007); *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), LBP-08-21, 68 NRC 554, 566-68 (2008).

⁵⁰⁸ *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028-35 (9th Cir. 2006).

⁵⁰⁹ *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007).

⁵¹⁰ *Id.* at 129.

⁵¹¹ *Id.* (internal quotations and citation omitted). The U.S. Court of Appeals for the Third Circuit affirmed the Commission's decision in CLI-07-8. *See N.J. Dep't. of Env'tl. Prot. v. NRC*, 561 F.3d 132, 140 (3d Cir. 2009). The court noted that the "NRC controls whether equipment within a facility is suitable for continued operation or could withstand an accident, but it has no authority over the airspace above its facilities." *Id.* at 139. Given this lack of control and the necessity of other intervening events (including the act of a third-party criminal), the Third Circuit found that the "causation chain is too attenuated to require NEPA review" (*id.* at 140), and expressly "disagree[d] with the [Ninth Circuit's] rejection of the 'reasonably close causal relationship' test set forth by the Supreme Court." *Id.* at 142.

⁵¹² Application at 1-1.

the U.S. Court of Appeals for the Fifth Circuit.⁵¹³ Consequently, no NEPA analysis of the potential environmental impacts of hypothetical acts of terrorism by third-party miscreants is required in this proceeding as a matter of law.

Petitioners and their proffered experts raise numerous other issues that are outside the scope of this proceeding. For example, Petitioners assert that “the WCS licensing proposal does not address the potential that a permanent repository may never open, and if it does open in the future, when that is expected and how wastes will be shipped to that repository.”⁵¹⁴ That concern constitutes a generic challenge to the CSR (*i.e.*, 10 C.F.R. § 51.23) and supporting CSR GEIS. Accordingly, it is barred by 10 C.F.R. 2.335(a), as Petitioners have not sought a waiver of the rule in this site-specific adjudicatory proceeding.

Notably, Petitioners also appear to impermissibly challenge certain other aspects of the CSR GEIS, including its assessment of potential acts of sabotage or terrorism.⁵¹⁵ They note that “[a]fter studying the assumptions and literature underlying the Continued Storage GEIS, [Dr. Thompson] determined that the NRC Staff conducted a limited, perhaps confused, study of terrorist threats and consequent radiological threats at Diablo Canyon.”⁵¹⁶ The adequacy of any

⁵¹³ See 28 U.S.C. § 41.

⁵¹⁴ Petition at 144 (citing Ballard Report at 26).

⁵¹⁵ Section 5.19 of the CSR GEIS considers the environmental impacts of potential acts of sabotage or terrorism and found them to be small. NUREG-2157 at 5-58. In that analysis, the Staff explains that it evaluated the potential impacts in relation to at-reactor ISFSIs, and that the same analysis applies to away-from-reactor ISFSIs, such as the WCS CISF. More specifically, the Staff concluded that “both the probability and consequences of a successful attack on an at-reactor ISFSI are low and, therefore, the environmental risk is SMALL.” *Id.* Applying this analysis to away-from-reactor ISFSIs, NUREG-2157 concluded that “the associated impacts would be SMALL during the three storage timeframes” considered. *Id.*

⁵¹⁶ Petition at 147 (citing Thompson 2018 Declaration at 11). Relatedly, insofar as Proposed Contention 14 seeks to raise issues beyond the initial license term of the WCS CISF, it impermissibly challenges the CSR and certain CSR GEIS findings. See, e.g., Petition at 148 (citing Dr. Thompson’s concern that “the loss of institutional controls could happen at the end of the first century of CISF operations,” and noting that “Dr. Thompson predicts that neglect or loss of institutional control of an ISFSI would mean an increased likelihood of theft and terrorism over time”).

such assessment by the Staff for purposes of that *generic* rulemaking plainly is not subject to litigation in this facility-specific licensing proceeding.

Petitioners' assertion that the NRC Staff and ISP "should define DBE's and DBT's for the whole duration of the transportation campaign" raises another generic concern about transportation safety evaluations that also falls outside the scope of this CISF licensing proceeding (and which would more appropriately be raised via the rulemaking process).⁵¹⁷ Moreover, in citing a "constantly-changing threat environment" for radioactive material shipments and the "consequent need to plan for an evolving variety of [DBTs] and beyond-design-basis-events," Petitioners appear to raise concerns related to NRC's Part 73 physical protection requirements.⁵¹⁸ Again, such generic concerns are not litigable here.⁵¹⁹

The foregoing examples illustrate Petitioners' repeated attempts to raise generic or otherwise out-of-scope issues, in direct contravention of 10 C.F.R. §§ 2.309(f)(1)(iii) and 2.335(a). Proposed Contention 14 accordingly should be rejected.

3. Proposed Contention 14 Lacks Adequate Legal Support and Fails to Establish a Genuine Material Dispute by Directly Challenging ISP's Environmental Report

In addition to lacking sufficient specificity and raising numerous out-of-scope concerns (deficiencies that by themselves warrant rejection of the proposed contention), Proposed Contention 14 also lacks adequate legal support and fails to establish a genuine dispute on a material issue of law or fact, contrary to the requirements of 10 C.F.R. §§ 2.309(f)(1)(v) and (vi). In short, Petitioners identify no supporting legal authorities for their multitudinous claims and

⁵¹⁷ *Id.* at 153.

⁵¹⁸ *Id.* at 142.

⁵¹⁹ *See, e.g., S.C. Elec. & Gas Co. & S.C. Pub. Serv. Auth.* (Virgil C. Summer Nuclear Station, Units 2 & 3), LBP-09-2, 69 NRC 87, 103 (2009) (finding that challenges to the adequacy of the design basis threat was outside the scope of the proceeding).

concerns. For example, there is no requirement that ISP foresee the “exact number of anticipated shipments and volumes,” the origination sites of the SNF (*i.e.*, ISP’s future customers), “exactly which routes the shipments will take to the CISF,” exact details of all the SNF (including burnup history), how much of each “waste type” would be transported per route, an inventory of the radionuclides, radiation exposures per shipment, and “secure in place locations” for each undefined route.⁵²⁰ Petitioners make no attempt to link these many suggested “areas of analysis” to specific NRC rules or regulations.⁵²¹ Nor do they explain why they warrant consideration under NEPA, which “does not call for ‘examination of every conceivable aspect of federally licensed projects’”⁵²² or demand “virtually infinite study and resources.”⁵²³ As the Second Circuit has aptly noted, “an EIS is required to furnish only such information as appears *reasonably necessary under the circumstances for evaluation of the project*, rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh

⁵²⁰ See Petition at 154-56.

⁵²¹ Furthermore, to the extent it openly proposes that the NRC adopt stricter requirements, asking the NRC to create new policies, new penalties, and NRC procedures, Proposed Contention 14 raises issues beyond the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii). A contention which “advocate[s] stricter requirements than those imposed by the regulations” is “an impermissible collateral attack on the Commission’s rules” and must be rejected. See *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), LBP-82-106, 16 NRC 1649, 1656 (1982); *Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397, 410, *aff’d in part and rev’d in part on other grounds*, CLI-91-12, 34 NRC 149 (1991). Furthermore, “a contention that simply states the petitioner’s views about what regulatory policy should be does not present a litigable issue.” *PPL Susquehanna LLC* (Susquehanna Steam Elec. Station, Units 1 & 2), LBP-07-10, 66 NRC 1, 23 (2007).

⁵²² *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 349 (2002) (quoting *LES*, CLI-98-3, 47 NRC at 102-03).

⁵²³ *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC 287, 315 (2010) (citation omitted). An EIS is not intended to be a “‘research document,’ reflecting the frontiers of scientific methodology, studies, and data.” *Id.* Moreover, the Commission has noted that “while there will always be more data that could be gathered, agencies ‘must have some discretion to draw the line and move forward with decisionmaking.’” *Id.* (internal quotation marks and citations omitted).

impossible.”⁵²⁴ Any attempt to address the myriad issues raised in Proposed Contention 14, even *assuming* their relevance and materiality, would run counter to this admonition.

Remarkably, Proposed Contention 14 contains no particularized references to ISP’s Environmental Report, despite being proffered as a NEPA contention. Instead, Petitioners allude to numerous issues in passing without identifying and controverting any specific portion of the ER. For instance, one of the 25 sub-contentions asserts that “NRC Staff and WCS must define the routine radiation exposures the public will face per shipment and over the lifespan of the operational life of the CISF.”⁵²⁵ Petitioners, however, fail to cite or challenge the analysis in ER Sections 4.2.6 (“Radiological Impacts of Transportation”) and 4.2.7.1 (“Incident Free Transportation Doses”), which address that specific issue. Likewise, Proposed Contention 14 includes various other references to transportation-related issues, but fails to identify and directly controvert any of the relevant discussion contained in ER Sections 3.2 (“Transportation”) and 4.2 (“Transportation Impacts”). Other sub-contentions only reiterate issues raised in other proposed contentions or rehash recommendations in the Ballard Report. Petitioners thus fail to meet their obligation to “read the relevant parts of the license application and show where the application is lacking,” as required by 10 C.F.R. § 2.309(f)(1)(vi).⁵²⁶

* * *

Accordingly, Proposed Contention 14 should be rejected because it meets none of the admissibility requirements in 10 C.F.R. §§ 2.309(f)(1)(i)-(vi).

⁵²⁴ *Callaway*, 524 F.2d at 88 (emphasis added).

⁵²⁵ Petition at 155.

⁵²⁶ *Palo Verde*, CLI-91-12, 34 NRC at 156.

Q. Proposed Contention 15 (Adoption of Other Proposed Contentions) Is Inadmissible

Proposed Contention 15 states:

Pursuant to 10 C.F.R. § 2.309(f)(3), Joint 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.⁵²⁷

Although styled as a “contention,” Petitioners’ request to adopt the proposed contentions of Sierra Club fails to satisfy any criteria in 10 C.F.R. § 2.309(f)(1), and therefore is inadmissible as a contention in this proceeding. For example, Proposed Contention 15 is immaterial to any finding the Staff must make to grant the Application, contrary to Section 2.309(f)(1)(iv), and fails to dispute any information in the Application, contrary to Section 2.309(f)(1)(vi). Viewed as a contention, it must be rejected.

Rather, Petitioners’ request is more appropriately viewed as a motion under 10 C.F.R. § 2.309(f)(3) to either co-sponsor or adopt Sierra Club’s contentions. The “Co-sponsorship Clause” in Section 2.309(f)(3) states:

If two or more requestors/petitioners seek to **co-sponsor** a contention, the requestors/petitioners shall jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.⁵²⁸

And the “Adoption Clause” in Section 2.309(f)(3) states:

If a requestor/petitioner seeks to **adopt** the contention of another sponsoring requestor/petitioner, the requestor/petitioner who seeks to adopt the contention must either agree that the sponsoring requestor/petitioner shall act as the representative with respect to that contention, or jointly designate with the sponsoring requestor/petitioner a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.⁵²⁹

⁵²⁷ Petition at 159.

⁵²⁸ Emphasis added.

⁵²⁹ Emphasis added.

To invoke the Adoption Clause, a requestor/petitioner first must establish that it has been granted standing in the proceeding, and that it sponsors at least one contention admitted in the proceeding, in its own right.⁵³⁰ Because the Petition does not affirmatively establish satisfaction of either of these conditions precedent,⁵³¹ Petitioners' request must be rejected.

Furthermore, the Petition contains conflicting assertions that cast doubt on Petitioners' satisfaction of the explicit requirements in 10 C.F.R. § 2.309(f)(3) and, indeed, which requirements even apply. For example, Petitioners appear to request permission to "adopt" Sierra Club's contentions; however, they also purport to "re-allege them as their own as if written [in the Petition]," which suggests they seek to co-sponsor, rather than adopt, those contentions.⁵³² They also purport to designate Sierra Club "as the primary representative" for Sierra Club's contentions (although failing to identify a single person authorized to conduct the representation), but makes a second assertion that they "reserve the matter of requesting co-sponsorship or joint designation for a later time."⁵³³ These ambiguous and competing assertions make Petitioners' intent unclear.

Moreover, based on Petitioners' "notice of their intentions of offering evidence and argument in support of the Sierra Club's contentions,"⁵³⁴ coupled with their assertion that Sierra Club is merely the "primary" representative for Sierra Club's contentions, Petitioners are apparently attempting to establish themselves as a joint, "secondary" representative for those contentions, which is impermissible under 10 C.F.R. § 2.309(f)(3). Ultimately, Petitioners'

⁵³⁰ *Consol. Edison Co.* (Indian Point, Units 1 & 2), CLI-01-19, 54 NRC 109, 131-33 (2001).

⁵³¹ *See supra* §§ III (Petitioners have not demonstrated standing); IV (none of Petitioners' proposed contentions is admissible).

⁵³² Petition at 159.

⁵³³ *Id.*

⁵³⁴ *Id.* at 159-60.

assertions simply are too vague and contradictory to evaluate, and their request therefore should be denied.

* * *

Proposed Contention 15—which is not a “contention” at all—fails to satisfy any criteria in 10 C.F.R. § 2.309(f)(1), and therefore is inadmissible as a contention in this proceeding. Furthermore, having failed to clearly establish that the conditions precedent to invocation of 10 C.F.R. § 2.309(f)(3), or the explicit requirements therein, have been satisfied, Petitioners’ request should be denied.

V. CONCLUSION

The Board should deny the Petition because Petitioners have failed to satisfy their affirmative burden to demonstrate standing, and also for the additional reason that they have failed to submit an admissible contention.

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

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Dated in Washington, D.C.
this 10th day of December 2018

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	Docket No. 72-1050
INTERIM STORAGE PARTNERS LLC)	
(Consolidated Interim Storage Facility))	December 10, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “Interim Storage Partners LLC’s Answer Opposing Hearing Request and Petition to Intervene Filed by Don’t Waste Michigan *et al.*” was filed through the E-Filing system.

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