

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board**

In the Matter of)	Docket No. 72-1051
Holtec International)	
(HI-STORE Consolidated Interim Storage Facility))	March 18, 2019
)	

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REPLY OF PETITIONERS DON'T WASTE MICHIGAN, *ET AL.* IN SUPPORT OF MOTION TO AMEND THEIR CONTENTIONS 4 AND 7

Now come Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, San Luis Obispo Mothers for Peace, and Nuclear Issues Study Group (collectively, "Joint Petitioners" or "DWM, *et al.*") and reply in support of their "Motion for Leave to Amend Contention 4 and Contention 7."

I. BACKGROUND

The new facts are straightforward; the implications arising from them are somewhat nuanced. In its RAI responses, Holtec stated that arriving canisters with problems will be held for indeterminate periods of time at a somewhat specific location on the storage facility site, albeit with unclear arrangements for regular inspection of the damaged, or leaking, or contaminated canisters. That somewhat detailed explanation is new information, and is materially different from Holtec's previous assurances that there will effectively be zero canisters requiring return to originating reactor sites because of the effectiveness of Holtec's screening at the sites.

Then, Holtec reinforced its denial that canisters with problems will even be delivered to the Consolidated Interim Storage Facility (“CISF”) because of the company’s promised thorough screening at reactor sites (response RAI 9-3): “Section 9.2.2 [of the SAR] has been revised to state that ‘no credible normal, off-normal or accident conditions’ could challenge the integrity of the canister confinement integrity and result in a release of any radioactivity.”

But at responses RAI LA-1, Holtec explained that it is adding a new § 5.5.5.b.3 to Appendix A of the proposed Materials License, which states that “loaded HI-STAR 190 casks containing canisters that do not pass the Krypton-85 test or helium leak test may be staged at the HI-STORE CISF prior to returning to the site of origin *or other facility licensed to perform fuel loading procedures, provided the 10 CFR 72.104 limits for the site [sic].*” (Emphasis added).

Thus after stoutly maintaining that it will have no need for a dry transfer system (“DTS”) for the first 100 years—and at the century mark, only to transfer spent nuclear fuel into new canisters—Holtec belatedly in this proceeding admits that within the 40-year initial license term it will instead have need for *someone else* to maintain DTS capability to take care of Holtec’s unloading and remediation of canisters. This is an important divergence from the Continued Storage GEIS, which importantly notes that presently, no DTS facilities exist anywhere.

DWM *et al.* stand by their contention that the GEIS does not “fit” Holtec in many important ways, and now has produced evidence that DTS availability, supposedly precluded from consideration in the Holtec CISF application because unnecessary during the initial 40-year licensing period, will actually be necessary during that licensing period.

Holtec’s self-generated contradiction poses issues of fact, that canisters will arrive with structural or contamination problems needing special handling because of the dangers. Holtec’s

requirement for DTS capability suggests new inquiries will have to be launched as part of the NEPA investigation, such as:

- (1) How many at-risk canisters and casks does it foresee?
- (2) What is the range or array of anomalous canister characteristics expected?
- (3) What provisions are there for expedited handling of canisters urgently needing remediation or emitting extraordinary levels of hazardous radiation?
- 4) If DTS capability is developed somewhere, will there still be a Holtec policy of returning canisters to the originating reactor site?
- 5) Will noncompliant canisters identified at originating reactor sites be diverted, not to Holtec, but to the location of the DTS, and if so, what will the potential environmental effects of that waste stream be?
- 6) Will the offsite DTS figure into canister reloading, using disposal canisters?
- 7) How can nonexistent DTS facilities merit a finding of NEPA compliance from the NRC?

II. ARGUMENT

Holtec and the NRC Staff collectively urge that even if DWM *et al.* have produced new information, it is not significant; or that it is not even new. For Holtec to shift from a dogmatic insistence that there will be no site emergencies rising to the level of requiring high-tech remediation in the form of a DTS during the first century of operations, to admitting the need for such capacity to be available (even if offsite), changes the operational thrust of Holtec significantly. For one thing, it signifies that Holtec planners may finally be moving into objective reality by admitting the possibility of problem canisters arriving at Holtec, which prompts the

need to adequately plan for addressing that high-risk hazard. A petitioner may be able to meet the late-filed contention requirements without a showing that the Staff's environmental review documents significantly differ from the applicant's environmental report by presenting significant new evidence not previously available. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993).

A new or amended contention may be timely for purposes of 10 C.F.R. 2.309(f)(2)(iii) if the new and material information was revealed in a piecemeal fashion, and where the foundation for the contention is not reasonably available until the later pieces fall into place. In such cases, the licensing board must determine when, as a cumulative matter, the separate pieces of the information puzzle were sufficiently in place to make the particular concerns readily apparent. *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 579 (2006). From this perspective, *DWM et al.* may be seen as amending and adding significant new information to the litigation in an attempt to keep up with Holtec's ever-evolving perception of the demands that project activity will present.

DWM et al. have brought to the ASLB's and parties' notice that Holtec now admits a need for dry transfer storage system availability much earlier in the CISF operations timeline than previously acknowledged. By doing so, *DWM et al.* have avoided the damned-if-you-do/don't evidence trap raised by the Holtec and NRC Staff oppositions. New information not specifically stated in the original contention and bases is deemed relevant if it falls within the "envelope," "reach," or "focus" of the contention when read with the original bases offered for it. Arguably, where an intervenor has provided additional specific information that falls within the ambit of its

original admitted contention, it is not really an “amendment” at all. *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 & 2), LBP-04-12, 59 NRC 388, 391 (2004). Perhaps the news that a DTS should be available during the first licensing period (indeed, *from the start of that 40 year period since it involves transport and delivery of spent nuclear fuel to Holtec*) is supplemental, and obviously relevant, to the contention. But if it falls outside such ambit, then an amended contention would be necessary in order for the new information to be considered relevant and admissible. *Id.* And so *DWM et al.* have done so. Thus even if the ASLB were to find that *DWM et al.*’s new information¹ somehow isn’t significant, Holtec and the NRC Staff surely cannot later claim that they were not notified that the strikingly earlier-than-originally-planned DTS availability condition would be part of the factual issues for trial.

For the foregoing reasons, Don’t Waste Michigan *et al.* pray the Atomic Safety and Licensing Board to grant them amendment of their Contentions 4 and 7 as requested.

Respectfully submitted,

___/signed electronically by/___

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¹The NRC Staff concedes the RAI information provided is new, while seeking to damn with faint praise *DWM et al.*’s revelation of Holtec’s significantly altered position concerning “off-normal conditions:” “DWM is correct that Holtec updated the SAR to include a conclusion in Section 9.2.2, in the discussion on confinement integrity, that no ‘off-normal . . . conditions’ could challenge the confinement system and result in a release. However, when the RAI and Holtec’s response is viewed in context, the information *DWM* now seeks to challenge was already included in the application.” NRC Staff Response to Don't Waste Michigan *et al.*'s proposed Amendments to Contentions 4 and 7 at 7.

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2019, the foregoing REPLY OF PETITIONERS DON'T WASTE MICHIGAN, *ET AL.* IN SUPPORT OF MOTION TO AMEND THEIR CONTENTIONS 4 AND 7 was deposited by me in the NRC's Electronic Information Exchange System and that according to protocols established for that system, it was to be automatically distributed to all registered counsel and parties of record.

_____/signed electronically by/_____
Terry J. Lodge
Counsel for DWM *et al.*, Petitioners