

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

NRC STAFF'S ANSWER OPPOSING THE ALLIANCE FOR ENVIRONMENTAL
STRATEGIES' PETITION FOR REVIEW OF LBP-19-4

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NRC Staff's Answer Opposing the Alliance for Environmental Strategies' Petition for Review of
LBP-19-4

Introduction

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission Staff (NRC Staff) submits its answer opposing the petition for review filed by the Alliance for Environmental Strategies (AFES).¹ This proceeding concerns Holtec International's (Holtec) HI-STORE license application to construct a consolidated interim storage facility (CISF) pursuant to the NRC's regulations in 10 C.F.R. Part 72.² In LBP-19-4, the Atomic Safety and Licensing Board (Board) denied all of AFES's proposed contentions.³ Because AFES does not show that the Board committed an error of law or abused its discretion in finding that AFES failed to present an admissible contention under 10 C.F.R. § 2.309(f)(1), the Commission should affirm the Board's decision.

¹ *Alliance for Environmental Strategies' Petition for Review of Board Memorandum and Order (LBP-19-4)* (May 31, 2019) (ADAMS Accession No. ML19151A283) (AFES Appeal).

² Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

³ *Holtec Int'l* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 NRC __ (May 7, 2019) (slip op.).

Background

On March 30, 2017, Holtec submitted an application, including a Safety Analysis Report (SAR), Environmental Report (ER), and proposed license, requesting that the NRC grant a license to Holtec for the construction and operation of a CISF for spent nuclear fuel.⁴ The proposed CISF would be located in Lea County, New Mexico. In its application, Holtec requests authorization to store up to 8,680 metric tons of uranium in up to 500 canisters for a license period of 40 years.⁵

On March 19, 2018, the NRC published a notice in the *Federal Register* regarding the acceptance and docketing of Holtec's CISF license application.⁶ The NRC subsequently published a *Federal Register* notice of opportunity to request a hearing and to petition for leave to intervene.⁷ AFES and several other petitioners submitted petitions to intervene and requests for hearing.⁸ On May 7, 2019, the Board denied AFES's hearing request for failing to submit an admissible contention in accordance with 10 C.F.R. § 2.309(f)(1).⁹ On May 31, 2019, AFES appealed the Board's decision.

⁴ Holtec's application materials are available at: <https://www.nrc.gov/waste/spent-fuel-storage/cis/holtec-international.html>. Unless otherwise specified, all the NRC Staff's citations to the ER are to Revision 5 (ML19095B800), all citations to the SAR are to Revision 0F (ML19052A379), and all citations to the proposed license are to Revision 0A (ML17310A223) (Proposed License).

⁵ Proposed License at 1.

⁶ Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 12,034 (Mar. 19, 2018).

⁷ Holtec International HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel, 83 Fed. Reg. 32,919 (July 16, 2018).

⁸ See *Alliance for Environmental Strategies' Petition to Intervene and Request for Hearing* (Sept. 12, 2018) (ML18255A234) (AFES Petition).

⁹ *Holtec Int'l*, LBP-19-4, 89 NRC at ___ (slip op. at 19, 127–31). The Board did not determine whether AFES has standing. *Id.* at 19. AFES's appeal does not address the standing question, and we do not discuss it further here.

Discussion

I. Applicable Legal Standards

A. Interlocutory Review of Petitions to Intervene under 10 C.F.R. § 2.311¹⁰

The NRC's regulations at 10 C.F.R. § 2.311(c) provide an appeal as of right on the question of whether a petition to intervene and/or request for hearing should have been granted. On threshold matters such as standing and contention admissibility, the Commission gives substantial deference to board rulings unless the appeal points to an error of law or abuse of discretion which might serve as grounds for reversal of the board's decision.¹¹ The Commission has maintained that “[r]ecitation of an appellant's prior positions in a proceeding or statement of general disagreement with a decision's result is not sufficient.”¹² Rather, a valid appeal “must point out the errors in the Board's decision.”¹³ In addition, an argument made before the board but not reiterated or explained on appeal is considered abandoned.¹⁴ Finally, the Commission will not entertain an argument that is raised for the first time on appeal.¹⁵ The Commission also

¹⁰ AFES invokes the review standards of 10 C.F.R. § 2.341. See, e.g., AFES Appeal at 2 (“The [NRC] Should Review the Memorandum on the Basis that the Memorandum Is Contrary to Law, Raises a [Substantial] and Important Question of Law or Policy, and Violates the Public Interest”). However, because AFES seeks review on the question of whether its hearing request should have been granted, 10 C.F.R. § 2.311(c) provides the applicable standard for interlocutory review. Section 2.341(a)(1) in turn specifies that it “does not apply to appeals under § 2.311.”

¹¹ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008) (citing *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), CLI-07-25, 66 NRC 101, 104 (2007); *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006)).

¹² *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Station, Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017) (citations omitted).

¹³ *Id.*

¹⁴ *Int'l Uranium (USA) Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001); see *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245 (2010).

¹⁵ See *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 235, 260 (1996) (rejecting an argument raised for the first time on appeal, which did not satisfy the factors for admission of late-filed contentions, on that basis alone).

will not allow an argument first made in a reply brief to provide the support required for an admissible contention.¹⁶

B. Legal Requirements for Contention Admissibility

10 C.F.R. § 2.309(f)(1) establishes the “basic criteria that all contentions must meet in order to be admissible.”¹⁷ Pursuant to that section, a 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 in the contention is within the scope of the proceeding;
- (iv) demonstrate that the issue raised in the contention 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 specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and
- (vi) provide information sufficient to show that a genuine dispute with the applicant/licensee exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case of an application that is asserted to be deficient, the identification of such deficiencies and supporting reasons for this belief.¹⁸

The Commission has strictly applied these contention admissibility requirements in NRC adjudications.¹⁹ Failure to comply with any one of these criteria is grounds for the dismissal of a

¹⁶ See *La. Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004) (stating that the Commission does “not allow . . . using reply briefs to provide, for the first time, the necessary threshold support for contentions”).

¹⁷ *Entergy Nuclear Vt. Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 571–72 (2006); see also *USEC Inc.* (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 436–37 (2006) (stating that the Commission “will reject any contention that does not satisfy the requirements”).

¹⁸ See 10 C.F.R. § 2.309(f)(1).

¹⁹ *Oyster Creek*, CLI-06-24, 64 NRC at 118 (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001) , *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002)).

contention.²⁰ The requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”²¹ The Commission has stated 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” as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.²² The Commission has emphasized that attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”²³ A contention must be rejected where, rather than raising an issue that is concrete or litigable, it reflects nothing more than a generalization regarding the petitioner’s view of what the applicable policies ought to be.²⁴

The Commission has also emphasized that “contentions shall not be admitted if at the outset they are not described with reasonable specificity or are not supported by some alleged fact or facts demonstrating a genuine material dispute” with the applicant.²⁵ The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”²⁶ In addition, 10 C.F.R. § 2.335(a) prohibits, absent waiver, a challenge to a Commission rule or regulation in any adjudicatory proceeding subject to 10 C.F.R. Part 2.

²⁰ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). See also *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 136 (2016).

²¹ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

²² *Id.*

²³ *Oyster Creek*, CLI-06-24, 64 NRC at 119 (quoting *Exelon Generation Co.* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

²⁴ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20–21 (1974)).

²⁵ *NextEra Energy Seabrook, LLC* (Seabrook Station Unit 1), CLI-12-5, 75 NRC 301, 307 (2012) (emphasis in original) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999)).

²⁶ *Seabrook*, CLI-12-5, 75 NRC at 307 (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003))).

II. The Board Correctly Found AFES's Contentions Inadmissible

AFES challenges the Board's rejection of its three proposed contentions, which all center on asserted environmental justice impacts of the proposed Holtec CISF.²⁷ The Board found that AFES failed to meet the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).²⁸ For the reasons discussed below, AFES does not demonstrate that the Board erred as a matter of law or abused its discretion in rejecting the contentions. Therefore, the Commission should affirm the Board's decision.

A. AFES Misstates the Applicable Contention Admissibility Requirements

Throughout its appeal, AFES appears to rely on contention admissibility principles that have long been superseded by the current requirements of 10 C.F.R. § 2.309(f)(1)(i)-vi). AFES, in its appeal, fails to mention 10 C.F.R. § 2.309(f)(1).

For example, AFES states that "all that is required for a contention to be acceptable for litigation is that it be specific and have a basis."²⁹ AFES further states that "the standard for the admission of contentions is lowered" when a license application is incomplete.³⁰ AFES similarly posits that petitioners "need do nothing more than 'give some basis for further inquiry'" while the applicant "must present a sufficient analysis of the environmental justice issues to demonstrate its application is complete."³¹

But current contention admissibility standards are deliberately more strict than the requirements that applied in various pre-1989 cases that AFES invokes.³² As the Board stated,

²⁷ See AFES Appeal at 3, 17, 18; AFES Petition at 11, 22, 23.

²⁸ See *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 19, 128–30).

²⁹ AFES Appeal at 2.

³⁰ *Id.* at 3.

³¹ *Id.* at 7 (internal citations omitted).

³² See Changes to the Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004); *Millstone*, CLI-01-24, 54 NRC at 358 (stating the NRC's contention admissibility requirements are "strict by design"); Rules

“the Commission strengthened the contention admissibility standards to what they are today—standards that afford evidentiary hearings only to those who ‘proffer at least some minimal factual and legal foundation in support of their contentions.’”³³ Although AFES need not prove its contentions to be granted an evidentiary hearing, the Commission has repeatedly held that it “will reject any contention that does not satisfy the admissibility requirements.”³⁴ As discussed in more detail below, AFES’s appeal does not demonstrate that the Board erred in determining that AFES’s contentions failed to satisfy the applicable legal requirements under 10 C.F.R. § 2.309(f)(1).

B. The Board Correctly Found AFES’s Contention 1 Inadmissible

In Contention 1, AFES asserts that Holtec fails to perform a sufficient investigation and analysis to show that its proposed CISF site will not have a disparate impact on the minority and low-income populations of the two counties, Eddy and Lea, near the site.³⁵ In its appeal, AFES emphasizes that Holtec fails to assess environmental justice impacts and alternative sites and states that it “agrees with the [Board’s] summary of AFES’s arguments” regarding its contentions.³⁶ As the Board summarized in LBP-19-4, the NRC established its environmental justice policy for NRC licensing and regulatory actions in response to Executive Order 12898³⁷

of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process (Final Rule), 54 Fed. Reg. 33,168, 33,170–71 (Aug. 11, 1989) (1989 Part 2 Revisions).

³³ *Holtec Int’l*, LBP-19-4, 89 NRC at __ (slip op. at 22) (quoting *Oconee*, CLI-99-11, 49 NRC at 334).

³⁴ *S.C. Elec. & Gas Co.* (Virgil C. Summer Nuclear Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010) (quoting *USEC Inc.*, CLI-06-9, 63 NRC at 437).

³⁵ AFES Petition at 11.

³⁶ AFES Appeal at 2.

³⁷ The term “environmental justice” refers to the federal policy established in 1994 by Executive Order 12898, which directed federal agencies to identify and address “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority and low-income populations.” As an independent agency, the Executive Order did not automatically apply to the NRC. *Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations*, Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

and a Commission decision holding that “NEPA requires the NRC to consider ‘social and economic impacts ancillary’ to environmental impacts.”³⁸ As the Board explained, the NRC’s environmental justice policy statement “directs the Staff to conduct a more thorough analysis ‘if the percentage in the impacted area significantly exceeds that of the State or County percentage for either the minority or low-income population.’”³⁹ The Board stated that, while not binding, NRC Staff’s guidance provides that the ER “should include ‘a discussion of the methods used to identify and quantify impacts on low-income and minority populations, the location and significance of any environmental impacts during construction on populations that are particularly sensitive, and any additional information pertaining to mitigation.’”⁴⁰

On appeal, AFES repeats its claims that the ER failed to sufficiently consider environmental justice impacts, objects to the ER’s consideration of environmental justice in site selection, and asserts that the Board’s analysis of Contention 1 is contradicted by the Board’s reasoning regarding standing. As the Board recognized, because AFES failed to identify a specific requirement for the ER to consider environmental justice impacts, or alternatives to the proposed action, in greater detail than it already contains, AFES failed to demonstrate a genuine dispute with the application. Further, AFES’s reliance on the Board’s discussion of standing misapprehends the Board’s reasoning. Accordingly, the Board correctly held that Contention 1 is inadmissible. These arguments are addressed in turn below.

³⁸ *Holtec Int’l*, LBP-19-4, 89 NRC at __ (slip op. at 126) (quoting *La. Energy Servs., L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 101 (1998)).

³⁹ *Id.* at 127 (quoting Policy Statement on the Treatment of Environmental Justice Matters in NRC Regulatory and Licensing Actions, 69 Fed. Reg. 52,040, 52,048 (Aug. 24, 2004)).

⁴⁰ *Id.* at 126–27 (quoting “Environmental Review Guidance for Licensing Actions Associated with NMSS Programs” (Final Report), NUREG-1748 (July 2003), at 6-25 (ML032450279) (NUREG-1748)).

1. The Board correctly determined that AFES failed to provide a legal justification requiring Holtec to further analyze environmental justice impacts⁴¹

In its appeal, AFES repeatedly asserts its previous claims that Holtec's ER is deficient for not analyzing environmental justice impacts. For example, AFES posits that "the absence of necessary and critical information [in Holtec's application can] be 'held against' the applicant."⁴² But AFES again fails to show a specific disagreement with the ER or a legal requirement for Holtec to provide more information than its application already contains concerning environmental justice impacts.

As the Board found, Section 3.8 of the ER discusses social and economic characteristics of the 50-mile region of influence (ROI) surrounding the proposed site.⁴³ Section 3.8.5 specifically discusses environmental justice populations in this 50-mile radius.⁴⁴ As the Board explained, this section of the ER "cites to and responds to Executive Order 12898 and the NRC's Environmental Justice Policy Statement regarding the proposed storage facility's ROI."⁴⁵ The ER subsequently evaluates the impacts of the proposed project on environmental justice populations in Section 4.8.4. AFES's appeal quotes the NRC's environmental justice policy statement at length.⁴⁶ But AFES fails to explain how those concerns constitute a specific disagreement with the ER's environmental justice analysis or provide any legal authority that requires Holtec to conduct a more detailed environmental justice review.⁴⁷ Conclusory

⁴¹ *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 127).

⁴² AFES Appeal at 6 (citing *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-82-75, 16 NRC 986, 993 (1982)).

⁴³ *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 127); ER at 3-95.

⁴⁴ ER at 3-98 to 3-100.

⁴⁵ *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 127).

⁴⁶ See AFES Appeal at 9–13.

⁴⁷ AFES also raises arguments regarding Contention 1 on appeal that it did not raise in its initial petition before the Board. Those arguments cannot form the basis for support now. See *LES*, CLI-04-35, 60 NRC at 623. For example, AFES asserts that "both Holtec and the judges entirely forgot about

assertions that an application is insufficient do not show a genuine dispute with the application as required by 10 C.F.R. § 2.309(f)(1)(vi).⁴⁸ AFES likewise repeats its claim that Holtec's environmental justice review is flawed for failing to compare the population near the proposed site to the entire U.S. population, but it does not provide a legal basis for determining that such a comparison is required.⁴⁹ Thus, the Board correctly determined that AFES's Contention 1 fundamentally fails to show a genuine dispute with the application's environmental justice analysis regarding a material issue of law or fact.

2. The Board correctly determined that AFES failed to identify a genuine dispute with Holtec's site selection process

Regarding Holtec's consideration of alternative sites, AFES asserts in its appeal that Holtec's application includes "literally nothing ... supporting a valid environmental justice analysis as to site selection" and faults the Board's statement about the ER's alternative sites description as "quite simply wrong."⁵⁰ AFES relies on a 1997 decision in which a licensing board determined the Staff's environmental review was inadequate because it did not consider racial discrimination in siting,⁵¹ but the Commission reversed that decision.⁵² In *Claiborne*, the Commission explained that Executive Order 12898 established no new rights or remedies, and merely reinforced the requirements of existing law—in this case, NEPA.⁵³ The Commission

cumulative impact" and that "Holtec has not submitted any analysis of the cumulative impact of a new dumping site on the already overburdened community near the Holtec site." AFES Appeal at 10–11. Nothing in AFES's discussion about the lack of a cumulative impacts analysis explains how that contradicts any conclusion in the application. AFES's argument thus fails to show how this asserted omission represents any error in the Board's conclusion that the contention is inadmissible.

⁴⁸ *Millstone*, CLI-01-24, 54 NRC at 358 (citing 1989 Part 2 Revisions, 54 Fed. Reg. at 33,17111, 1989).

⁴⁹ AFES Appeal at 17.

⁵⁰ *Id.* at 5.

⁵¹ *La. Energy Servs., L.P.* (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367, 412 (1997) , aff'd in part, rev'd in part, CLI-98-3, 47 NRC 77 (1998).

⁵² *Claiborne*, CLI-98-3, 47 NRC at 102.

⁵³ *Id.*

noted that the *Claiborne* board's approach was also incompatible with Council on Environmental Quality (CEQ) guidance for implementing Executive Order 12898, which "focuses exclusively on identifying and adequately assessing the *impacts* of the proposed actions on minority populations, low-income populations, and Indian Tribes."⁵⁴

The Commission also found that the *Claiborne* board's approach "would go beyond what CEQ has stated is required of an agency considering a license application."⁵⁵ When, as with Holtec's application, "a federal agency is not the sponsor of a project, the federal government's consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project."⁵⁶ While the Staff is responsible for the NEPA review associated with an application (in this case, preparing an EIS), Holtec's ER "should contain sufficient data to aid the Commission in its development of an independent analysis."⁵⁷ Although AFES criticized Holtec's use of the Eddy-Lea Energy Alliance (ELEA) report in its consideration of alternative sites, AFES failed to articulate its specific disagreement with the ER to explain how the application does not meet the requirements of 10 C.F.R. § 51.45(c) to analyze environmental effects of the proposed site and its alternatives.

As the Board summarized in LBP-19-4, insofar as Contention 1 asserts that Holtec failed to consider alternative sites, it seeks to raise a contention of omission.⁵⁸ But in ER Sections 2.3 and 2.4 Holtec discusses alternative sites, including consideration of six sites and an explanation of the site selection methodology.⁵⁹ The ER also evaluates location alternatives and

⁵⁴ *Id.* (emphasis in original).

⁵⁵ *Id.* at 103.

⁵⁶ *Id.* at 104 (quoting *City of Grapevine v. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir 1994), cert. denied, 513 U.S. 1043 (1994)).

⁵⁷ 10 C.F.R. § 51.45(c).

⁵⁸ *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 128).

⁵⁹ See ER at 2-15 to 2-17.

the important attributes of the proposed site that serve the project's purpose.⁶⁰ AFES fails to show that NEPA or NRC regulations require a more detailed environmental justice analysis regarding site selection than what Holtec's ER provides. Thus, the Board correctly found this aspect of Contention 1 inadmissible as well.

3. Contrary to AFES's claim, the Board's discussion of standing does not provide a basis for finding Contention 1 admissible

Although the Board did not rule on whether AFES has standing,⁶¹ on appeal AFES invokes the Board's discussion of standing as support for the admissibility of Contention 1.⁶² AFES references the Board's observation that "the proposed Holtec facility is envisioned as potentially much larger than any previous spent fuel storage facility."⁶³ AFES then attributes to the Board the conclusion that therefore "the presumption of standing might exist for persons living and working outside the fifty-mile radius of the site."⁶⁴ AFES asserts that as a result, "Holtec's environmental justice investigation must also go beyond a fifty-mile radius of the proposed site."⁶⁵

This logic reflects a fundamental misreading of the Board's analysis of standing, which considered the applicability of the "proximity presumption" to the Holtec facility as a means of assessing whether petitioners living within a specified distance of the proposed facility should be presumed to have standing due to an obvious potential for offsite consequences from the proposed facility. The Board observed that while a 50-mile proximity presumption applies in

⁶⁰ *Id.* at 2-18 to 2-20.

⁶¹ *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 19).

⁶² AFES Appeal at 4.

⁶³ *Id.* (quoting *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 18)).

⁶⁴ AFES Appeal at 4.

⁶⁵ *Id.*

certain proceedings associated with nuclear power plant sites,⁶⁶ the greatest distance for which this presumption has been applied in a spent fuel storage facility adjudication is 17 miles.⁶⁷ And with respect to AFES, the Board accordingly questioned whether 35 miles, which is the closest that an AFES member lives to the proposed site, is sufficient to support standing in a spent fuel storage proceeding, given that it would more than double the maximum distance previously found sufficient.⁶⁸ The Board thus did not establish a specific proximity to the proposed site that would serve to establish standing. And it certainly did not determine, as AFES implies, that people who live and work more than 50 miles from the site may have standing “because the potential effects of the Holtec site might reach beyond 50 miles.”⁶⁹

In short, AFES’s misinterpretation of the Board’s evaluation of standing does not provide any grounds to disturb the Board’s finding that Contention 1 is inadmissible. Further, AFES fails to demonstrate a genuine dispute with Holtec’s application concerning the ER’s consideration of environmental justice impacts and site selection. Accordingly, AFES does not show that the Board erred in law or abused its discretion in finding Contention 1 inadmissible.

C. The Board Correctly Found AFES’s Contention 2 Inadmissible

With respect to Contention 2, AFES on appeal repeats its assertion that the siting process will have a disparate impact on the minority and low-income population of Eddy and Lea counties.⁷⁰ AFES also repeats its criticism that “Holtec’s reliance on an invitation for siting

⁶⁶ *Holtec Int’l*, LBP-19-4, 89 NRC at __ (slip op. at 18); see, e.g., *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915–16 (2009).

⁶⁷ *Holtec Int’l*, LBP-19-4, 89 NRC at __ (slip op. at 18) (citing *Pac. Gas and Elec. Co. (Diablo Canyon Power Independent Spent Fuel Storage Installation)*, LBP-02-23, 56 NRC 413, 428–29 (2002) (determining 17 miles sufficient for standing)).

⁶⁸ *Holtec Int’l*, LBP-19-4, 89 NRC at __ (slip op. at 18).

⁶⁹ AFES Appeal at 4.

⁷⁰ *Id.* at 17.

by a small group of government officials is a deficient process from the outset.”⁷¹ As in its petition, AFES’s appeal references and relies on a report from Professor Myriah Gómez, Ph.D.⁷² AFES states that Dr. Gómez finds that Holtec’s proposed site “is an example of environmental racism.”⁷³

As the Board explained, the ER’s environmental justice analysis is guided by the NRC’s environmental justice policy statement and associated Staff guidance developed in response to Executive Order 12898 that directed federal agencies to assess environmental justice impacts.⁷⁴ The Board observed that Holtec structured its environmental justice review using NRC guidance and found that AFES’s petition did not actually challenge the information in Holtec’s ER, but rather the NRC’s environmental justice policy and implementing guidance themselves. On appeal, AFES’s only explanation of its disagreement with the Board’s analysis is a single sentence simply reiterating its concerns with Holtec’s “process” and referring to its arguments regarding Contention 1.⁷⁵ Accordingly, AFES fails to identify any error or abuse of discretion in the Board’s determination that AFES’s Contention 2 is inadmissible for failing to show a genuine dispute with the application regarding a material issue of law or fact.⁷⁶

⁷¹ *Id.* at 17–18.

⁷² See AFES Ex. 7, “Environmental Racism an Active Factor in the Siting and White Privilege Associated with the Holtec International HI-STORE Consolidated Interim Storage Facility Project” (Sept. 7, 2018) (ML18255A234).

⁷³ AFES Appeal at 17.

⁷⁴ *Holtec Int’l*, LBP-19-4, 89 NRC at __ (slip op. at 129); see also *supra* n. 37 and accompanying text.

⁷⁵ As with its appeal of Contention 1, AFES alludes in passing to arguments regarding cumulative impacts and an “effective scoping process” that it did not raise in its initial petition before the Board. See AFES Appeal at 18. Such arguments should not be considered for the first time on appeal.

⁷⁶ 10 C.F.R. § 2.309(f)(1)(vi).

D. The Board Correctly Found AFES's Contention 3 Inadmissible

In Contention 3, AFES challenges Holtec's statements of community support in the ER.⁷⁷

In its appeal, AFES asserts that Holtec's environmental justice analysis "relied almost entirely on ELEA's support for Holtec's site selection," and that ELEA does not represent minority and low-income populations of Eddy and Lea counties.⁷⁸ But the Board observed that whether Holtec's application has public support or not has no bearing on the environmental justice analysis for the proposed facility.⁷⁹ Section 4.8.4 of the ER, which contains Holtec's site-specific environmental justice analysis, does not discuss community support or lack thereof.⁸⁰ Rather, the Board observed that the ER's environmental justice analysis is structured around the categories of information described in Staff guidance in NUREG-1748, Appendix C and that AFES had identified "no other source of law that places weight on 'community support' with regard to the selection of a project site[.]"⁸¹ Accordingly, the Board found Contention 3 inadmissible because AFES failed to demonstrate that community support is material to the findings the NRC must make regarding Holtec's application.⁸²

AFES's appeal does not specify any error in the Board's characterization of the content of the application or of the applicable legal standards or guidance. Rather, AFES claims that because "Holtec relied almost entirely on ELEA's support for Holtec's site selection in Holtec's environmental justice analysis", the Board's rejection of Contention 3 means that Contention 1

⁷⁷ AFES Petition at 23; see also AFES Appeal at 18. (In its Petition, AFES appeared to concede its own argument, stating that "community support *per se* is not material to the findings the NRC must make to issue a license." AFES Petition at 23. The Board's decision rejecting Contention 3 quotes from this statement. *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 129)).

⁷⁸ AFES Appeal at 18–19.

⁷⁹ *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 130).

⁸⁰ ER at 4-29.

⁸¹ *Holtec Int'l*, LBP-19-4, 89 NRC at __ (slip op. at 130).

⁸² *Id.*

must be found admissible.⁸³ However, as discussed above, the Board's finding that Contention 1 is inadmissible was not based on a determination that Holtec had demonstrated community support for its site selection process, but rather on AFES's failure to dispute the contents of the ER or to identify a legal requirement that Holtec conduct a more detailed environmental justice review. There is thus no inconsistency between the Board's determination that Contention 1 failed to show a genuine dispute with Holtec's application (as required by 10 C.F.R. § 2.309(f)(1)(vi)) or in its determination that Contention 3 failed to raise an issue material to the findings the NRC must make regarding Holtec's application (as required by 10 C.F.R. § 2.309(f)(1)(iv)). AFES has not demonstrated that the Board erred or abused its discretion in finding Contention 3 inadmissible.

Conclusion

For the reasons stated above, AFES does not demonstrate any error of law or abuse of discretion in the Board's determination in LBP-19-4 that AFES did not submit an admissible contention. Therefore, the Commission should affirm the Board's decision.

⁸³ AFES Appeal at 18–19 (asserting that Holtec cannot “have it both ways”).

Respectfully submitted,

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Dated in Rockville, MD
this 25th day of June 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

HOLTEC INTERNATIONAL

(Consolidated Interim Storage Facility)

Docket No. 72-1051

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R § 2.305, I hereby certify that copies of the foregoing "NRC Staff's Answer Opposing the Alliance for Environmental Strategies' Petition for Review of LBP-19-4," dated June 25, 2019, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 25th day of June 2019.

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Dated in Rockville, MD
this 25th day of June 2019