

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	Docket No. 72-1051
Holtec International)	
)	
(HI-STORE Consolidated Interim Storage Facility))	ASLBP No. 18-958-01
)	

**HOLTEC INTERNATIONAL'S BRIEF IN OPPOSITION TO DON'T WASTE
MICHIGAN, ET AL.'S APPEAL OF LBP-19-4**

Erin E. Connolly
Corporate Counsel
HOLTEC INTERNATIONAL
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900 x 3712
e.connolly@holtec.com

Jay E. Silberg
Michael G. Lepre
Timothy J. V. Walsh
Anne R. Leidich
Sidney L. Fowler
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: 202-663-8707
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
michael.lepre@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com
sidney.fowler@pillsburylaw.com

Counsel for HOLTEC INTERNATIONAL

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I. Introduction

Pursuant to 10 C.F.R. § 2.311(b), Holtec International (“Holtec”) submits this brief in opposition to the Notice of Appeal of LBP-19-4 and Brief In Support Of Appeal (“Appeal”) filed in this proceeding by Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Study Group (collectively “DWM”) on June 3, 2019.¹ DWM challenges the Atomic Safety and Licensing Board’s (“Board”) May 7, 2019 Memorandum and Order (Ruling on Petitions for Intervention and Requests for Hearing) (“LBP-19-4”) in the Nuclear Regulatory Commission (“NRC” or “Commission”) licensing proceeding for Holtec’s proposed HI-STORE Consolidated Interim Storage Facility (“CISF”).

As set forth below, LBP-19-4 properly denied the petition to intervene and request for hearing submitted by DWM.² Holtec requests that the Commission reject the Appeal because it fails to identify any error or abuse of discretion in the Board’s ruling. The Appeal merely repeats the claims

¹ Notice of Appeal of LBP-19-4 by [DWM] and Brief in Support of Appeal (June 3, 2019) (NRC ADAMS Accession No. ML19154A764) (the “Appeal”).

² LBP-19-4 at 15.

made in DWM’s earlier pleadings and oral argument before the Board, attempts to introduce new facts and arguments not presented before the Board, and lacks substantive explanation or argument as to how the Board erred in its determinations that DWM lacked standing and that DWM’s proposed contentions failed to satisfy the admissibility standards set forth in 10 C.F.R. § 2.309(f)(1).

II. Statement of the Case

Holtec submitted its application to construct and operate the CISF on March 30, 2017.³ The NRC Staff conducted a sufficiency review and found the Application acceptable for docketing.⁴ On July 16, 2018, the NRC published notice in the Federal Register of an opportunity to request a hearing and petition to intervene by September 14, 2018.⁵ On September 14, 2018, DWM filed its Petition to Intervene and Request for Adjudicatory Hearing (“Petition to Intervene”).⁶

On October 9, 2018, Holtec and the NRC Staff filed answers to the Petition to Intervene.⁷ Holtec and NRC Staff opposed the standing of DWM and opposed the admission of all DWM’s

³ The Holtec International HI-STORE Consolidated Interim Storage Facility License Application (Mar. 30, 2017) (NRC ADAMS Accession No. ML17115A431) (the “Application”).

⁴ Holtec International’s HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel Docketing License Application, 83 Fed. Reg. 12,034, 12,035 (Mar. 19, 2018).

⁵ Holtec International’s HI-STORE Consolidated Interim Storage Facility for Interim Storage of Spent Nuclear Fuel License Order of Opportunity to Request a Hearing and to Petition for Leave to Intervene, 83 Fed. Reg. 32,919-24 (July 16, 2018).

⁶ Petition of [DWM] to Intervene and Request for an Adjudicatory Hearing (Sept. 14, 2018) (NRC ADAMS Accession No. ML18257A334).

⁷ Holtec International’s Answer Opposing the Don’t Waste Michigan, Citizens’ Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Study Group Petition to Intervene and Request for an Adjudicatory Hearing on Holtec International’s HI-STORE Consolidated Interim Storage Facility Application (Oct. 9, 2018) (NRC ADAMS Accession No. ML18282A509) (“Holtec Oct. 9 Answer”); NRC Staff’s Consolidated Response to Petitions to Intervene and Requests for Hearing filed by Alliance for Environmental Strategies, Beyond Nuclear, Inc., Don’t Waste Michigan, et al., NAC International Inc., and the Sierra Club (Oct. 9, 2018) (NRC ADAMS Accession No. ML18282A567) (“NRC Staff Oct. 9 Answer”).

contentions. DWM filed its reply on October 16, 2018.⁸ Following its reply, DWM filed a number of other motions with the Board,⁹ to which Holtec and/or NRC Staff replied.¹⁰

The Board heard oral argument on January 23 and 24, 2019, in Albuquerque, New Mexico. On May 7, 2019, the Board issued LBP-19-4. The Board found that DWM failed to demonstrate standing in accordance with 10 C.F.R. § 2.309(d), and also found that it had failed to proffer any

⁸ Combined Reply of Don't Waste Michigan, Citizens' Environmental Coalition, Citizens for Alternatives to Chemical Contamination, Nuclear Energy Information Service, Public Citizen, Inc., San Luis Obispo Mothers for Peace, and Nuclear Issues Study Group to Holtec and NRC Answers (Oct. 16, 2018) (NRC ADAMS Accession No. ML18289B319) ("DWM Oct. 16 Reply").

⁹ Joint Motion to Establish Hearing Procedures by Sierra Club, [DWM] (Jan. 3, 2019) (NRC ADAMS Accession No. ML19003A279); Motion of [DWM] to Adopt and Litigate Sierra Club Contentions (Jan. 11, 2019) (NRC ADAMS Accession No. ML19011A158); Motion by Petitioners Beyond Nuclear, Fasken, the Sierra Club, and [DWM], to Amend their Contentions to Address New Information Confirming that Holtec's License Application Contains False or Misleading Statements and Motion by Petitioners to Strike Unreliable Statements from Holtec's Responses to Petitioners' Hearing Requests (Jan. 15, 2019) (NRC ADAMS Accession No. ML19015A066); Motion by Petitioners' [DWM] for Leave to File a New Contention (Jan. 17, 2019) (NRC ADAMS Accession No. ML19017A348); Motion by [DWM] to Amend their Contention 2 Regarding Federal Ownership of Spent Fuel in the Holtec International Revised License Application (Feb. 6, 2019) (NRC ADAMS Accession No. ML19037A501); Motion of [DWM] to Amend their Contentions 4 and 7 Regarding Holtec's Decision to have no Dry Transfer System Capability and Holtec's Policy of Returning Leaking, Externally Contaminated or Defective Casks and/or Canisters to Originating Reactor Sites (Feb. 18, 2019) (NRC ADAMS Accession No. ML19049A024); Reply of [DWM] to Holtec and NRC Staff Opposition Filings to DWM Proposed Contention 14 (Feb. 20, 2019) (NRC ADAMS Accession No. ML19051A095); Motion of [DWM] to Amend Their Contention 2 Regarding Holtec's Proposed Means of Financing the Proposed Consolidated Interim Storage Facility (Feb. 25, 2019) (NRC ADAMS Accession No. ML19056A001); Reply of [DWM] in Support of Motion to Amend Their Contentions 4 and 7 (Mar. 18, 2019); Combined Reply of [DWM] in Support of Motion to Amend Their Contention 2 Regarding Holtec's Proposed Means of Financing the Proposed Consolidated Interim Storage Facility (Mar. 25, 2019) (NRC ADAMS Accession No. ML19084A009).

¹⁰ NRC Staff Response to Joint Motion to Establish Hearing Procedures (Jan. 9, 2019) (NRC ADAMS Accession No. ML19009A100); Holtec International's Answer Opposing [DWM] and Sierra Club's Joint Motion to Adopt Hearing Procedures (Jan. 14, 2019) (NRC ADAMS Accession No. ML19014A224); Holtec International's Answer Opposing Motions by Sierra Club and [DWM] to Adopt the Other's Contentions (Jan. 17, 2019) (NRC ADAMS Accession No. ML19017A178); NRC Staff's Consolidated Response to [DWM] and the Sierra Club's Motions to File New Contentions (Feb. 19, 2019) (NRC ADAMS Accession No. ML19051A017); Holtec Opposition to Late-Filed Sierra Club Contention 26 and [DWM] Contention 14 (Feb. 19, 2019) (NRC ADAMS Accession No. ML19050A454) ("Late-filed Sierra Club Contention 16 and DWM Contention 14"); NRC Staff Answer to Motions to Amend Contentions Regarding Federal Ownership of Spent Fuel (Feb. 19, 2019) (NRC ADAMS Accession No. ML19050A376); Holtec Opposition to [DWM] Motion to Amend Contention 2 (Feb. 19, 2019) (NRC ADAMS Accession No. ML19052A361); NRC Staff's Response to [DWM] Motion to Amend Contentions 4 and 7 (Mar. 14, 2019) (NRC ADAMS Accession No. ML19073A307); Holtec Opposition to [DWM] Motion to Amend Contentions 4 and 7 (Mar. 15, 2019) (NRC ADAMS Accession No. ML19074A137); Holtec Opposition to [DWM] Motion to Amend Contention 2 (Mar. 22, 2019) (NRC ADAMS Accession No. ML19081A112); NRC Staff Response to [DWM] Motion to Amend Contention 2 (Mar. 22, 2019) (NRC ADAMS Accession No. ML19081A152).

admissible contention meeting the requirements of 10 C.F.R. § 2.309(f)(1).¹¹ Therefore, in accordance with 10 C.F.R. § 2.309(a), the Board denied the Petition to Intervene and either granted or denied DWM’s other motions.¹²

III. Standard of Review

As noted in LBP-19-4, 10 C.F.R. § 2.311 provides that a licensing board order wholly denying a petition to intervene or request for hearing is appealable under 10 C.F.R. § 2.311(c), which provides:

An order denying a petition to intervene, and/or request for hearing . . . is appealable by the requestor/petitioner on the question as to whether the request and/or petition should have been granted.¹³

The Commission “regularly affirm[s] Board decisions on the admissibility of contentions where the appellant points to no error of law or abuse of discretion.”¹⁴ The Commission “gives a Board’s ruling on standing ‘substantial deference’ . . . [and] defers to the Board’s rulings on standing absent an error of law or abuse of discretion.”¹⁵ As such, “[p]ointing out the errors in the Board’s decision is a basic requirement for an appeal,”¹⁶ and “a mere recitation of an appellant’s prior positions in a proceeding or a statement of his or her general disagreement with a decision’s results

¹¹ LBP-19-4 at 135.

¹² *Id.* at 135-36.

¹³ 10 C.F.R. § 2.311(c).

¹⁴ *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 N.R.C. 111, 121 (2006) (internal quotation marks omitted) (quoting *USEC Inc. (American Centrifuge Plant)*, CLI-06-9, 63 N.R.C. 433, 439 n.32 (2006)); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 N.R.C. 631, 637 (2004) (“Commission affirms Board rulings on admissibility of contentions if the appellant ‘points to no error of law or abuse of discretion.’” (quoting *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-00-21, 52 N.R.C. 261, 265 (2000))).

¹⁵ *Strata Energy, Inc.* (Ross in Situ Uranium Recovery Project), CLI-12-12, 75 N.R.C. 603, 604 (2012) (quoting *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 N.R.C. 911, 914 (2009)).

¹⁶ *Shieldalloy Metallurgical Corp.* (License Amendment Request for Decommissioning of the Newfield, New Jersey Facility), CLI-07-20, 65 N.R.C. 499, 503 (2007) (regarding appeal of denied intervention petitions under 10 C.F.R. § 2.311) (citing *AmerGen Energy*, CLI-06-24, 64 N.R.C. at 121).

‘is no substitute for a brief that identifies and explains the errors of a Licensing Board in the order below.’”¹⁷

It is a *petitioner’s* responsibility to point to the errors in the board’s ruling. Licensing board rulings are affirmed where the “brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of the Board’s decision.”¹⁸ A “failure to illuminate the bases” for an exception to the board’s decision is “sufficient grounds to reject it as a basis for appeal.”¹⁹

The Commission has held that:

The *appellant* bears the *responsibility of clearly identifying the errors* in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant’s claims.²⁰

Further, a petitioner is limited to the contentions as initially filed and may not rectify its deficiencies through an appeal.²¹ The Commission has explained that, “absent extreme circumstances, [it] will not consider on appeal ‘either new arguments or new evidence supporting the contentions, which the Board never had the opportunity to consider.’”²² New claims on appeal

¹⁷ *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-10, 37 N.R.C. 192, 198 (1993) (quoting *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 N.R.C. 63, 66 (1992)). Moreover, “[o]n a petition for review, [a petitioner] must adequately call the Commission’s attention to claimed errors in the Board’s approach. . . . [the Commission] deem[s] waived any arguments not raised before the Board or not clearly articulated in the petition for review.” *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 N.R.C. 370, 383 (2001) (internal citations omitted).

¹⁸ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 N.R.C. 261, 265 (2000).

¹⁹ *Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-94-6, 39 N.R.C. 285, 297 (1994).

²⁰ *Id.*, citing *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 N.R.C. 1, 9 (1990) (emphasis added); *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 N.R.C. 277, 278 (1982).

²¹ See *USEC, Inc.* (American Centrifuge Plant), CLI-06-10, 63 N.R.C. 451, 458 (2006); cf. *Louisiana Energy Servs.* (National Enrichment Facility), CLI-04-25, 60 N.R.C. 223, 225 (2004) (“In Commission practice, and in litigation practice generally, new arguments may not be raised for the first time in a reply brief.” (footnote omitted)).

²² *USEC*, CLI-06-10, 63 N.R.C. at 458 (quoting *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 N.R.C. 125, 140 (2004)).

are prohibited because “[a]llowing petitioners to file vague, unsupported contentions, and later on appeal change or add contentions at will would defeat the purpose of [the NRC’s] contention-pleading rules.”²³ Moreover, “[t]he purpose of an appeal to the Commission is to point out errors made in the Board’s decision, not to attempt to cure deficient contentions by presenting arguments and evidence never provided to the Board.”²⁴

IV. Argument

A. The Board Correctly Rejected DWM’s Contentions

1. Contention 1 (Cultural Resources Redaction)

In Contention 1, DWM claimed that the redaction of pages from Appendix C of Holtec’s Environmental Report (“ER”) violated the National Environmental Policy Act and the National Historic Preservation Act.²⁵ According to DWM, due to the Appendix C redactions, Holtec’s ER failed to disclose details relevant for allowing the public “to ascertain whether the cultural resources are eligible for nomination to the National Register of Historic Places, to determine whether required consultations have occurred and whether there are mitigation measures available if the properties are destroyed.”²⁶ DWM also claimed that the Appendix C redactions made public involvement regarding these issues “impossible.”²⁷

In its Answer to Contention 1, Holtec pointed out that the redactions were made by the NRC (not Holtec), and that the NRC offered to make the redacted information publicly available through

²³ *Id.* (citing *Louisiana Energy Servs., L.P.* (National Enrichment Facility), CLI-04-35, 60 N.R.C. 619, 622–23 (2004)).

²⁴ *USEC*, CLI-06-10, 63 N.R.C. at 458.

²⁵ Petition to Intervene at 26.

²⁶ *Id.*

²⁷ *Id.* at 27.

its SUNSI procedures, which DWM failed to utilize.²⁸ In its Reply, DWM argued that the SUNSI process is “protracted” and “cloyed.”²⁹ It added that the SUNSI process is:

incapable of yielding the result sought by [DWM], who at all times have sought *public* disclosure of details that would allow the *public* to ascertain for themselves whether the two unidentified cultural resources that would be directly affected by the project are eligible for nomination to the National Register of Historic Places, to determine whether required consultations have occurred; and to ascertain whether there are mitigation measures available if the properties have been destroyed and advocate for mitigation or preservation.³⁰

In its Appeal, DWM again claims that SUNSI access to the redacted information would not resolve Contention 1 because the SUNSI process is “protracted” and “cloyed.”³¹ DWM also again adds:

[The] SUNSI process will not yield *public* disclosure of the details that would allow the *public* to decide for themselves whether the two unidentified cultural resources that would be directly affected by the project are eligible for nomination to the National Register; to determine whether required consultations have occurred; and to ascertain whether there are preservation or mitigation measures available if the properties will be destroyed and advocate for mitigation or preservation.³²

Accordingly, rather than allege that the Board erred or abused its discretion, as is required to sustain an appeal,³³ DWM merely repeats the same arguments it made before the Board, even using nearly identical language. For that reason alone, the Appeal should be denied.

DWM not only merely reiterates the arguments it raised below – it also fails to show how the Board erred. The Board found Contention 1 inadmissible because (1) the NRC Staff will make

²⁸ Holtec Oct. 9 Answer at 25-28.

²⁹ DWM Oct. 16 Reply at 24.

³⁰ *Id.* (emphasis in original).

³¹ Appeal at 20-21.

³² *Id.* at 21 (emphasis in original).

³³ See *Texas Utilities Electric Co.*, CLI-93-10, 37 N.R.C. at 198.

available to the public any information that would not harm potential historic properties; and (2) DWM (and therefore also the public) had two opportunities to request the redacted information through the SUNSI process but failed to do so.³⁴ DWM has not addressed these findings. Nor has it even attempted to show, nor could it show, how the public lacks access to information that was publicly available through the SUNSI process and that the NRC Staff has said it will release to the public.

For these reasons, the Commission should reject DWM's Appeal of the Board's ruling dismissing Contention 1.

2. Contention 2 (Assurances of Financing)

As originally filed, Contention 2 alleged that Holtec failed to provide reasonable assurance that it could finance the costs of constructing, operating, maintaining, and decommissioning the CISF.³⁵ Contention 2 was initially based on the argument that Holtec "will not construct the CISF without financial guarantees from the U.S. Department of Energy."³⁶ DWM twice amended Contention 2. The second of those two amendments is relevant to the Appeal.

Specifically, more than five months after filing its original Petition to Intervene, DWM moved for a second time to revise Contention 2's basis by "replac[ing] their five-page basis statement for Contention 2 with a fifteen-page statement accompanied by a fourteen-page expert [declaration]."³⁷ The Board found this amendment to be inadmissible for failing to satisfy the

³⁴ LBP-19-4 at 91-92.

³⁵ Petition to Intervene at 31-32.

³⁶ *Id.* at 32.

³⁷ LBP-19-4 at 93; *see* Motion of Petitioners Don't Waste Michigan, et al. to Amend Their Contention 2 Regarding Holtec's Proposed Means of Financing the Proposed Consolidated Interim Storage Facility (Feb. 25, 2019) (NRC ADAMS Accession No. ML19056A001).

Commission's criteria for admitting late-filed contentions under 10 C.F.R. § 2.309(c).³⁸ The Board added that, even if the second amendment had satisfied the late-filing criteria, Contention 2 was nevertheless inadmissible under 10 C.F.R. 2.309(f)(1)(vi) for failing to raise a genuine dispute with the Application.³⁹ The Board also rejected the second amendment as outside the scope of the proceeding under 10 C.F.R. § 2.309(f)(1)(iii).⁴⁰

The Appeal only challenges the Board's finding that the second amendment to Contention 2 was outside the scope of the proceeding.⁴¹ The Commission, however, need not even reach that issue. As described above, the Board found the second amendment inadmissible under 10 C.F.R. 2.309(c) because it failed to meet the Commission's criteria for admitting late-filed contentions. The Appeal does not challenge that ruling. Accordingly, the Board's ruling dismissing the amended contention as out of time controls, and the Commission need not consider on appeal DWM's challenges to the Board's superfluous dismissal of Contention 2 on other grounds.

But even if the Commission decides to address the substance of DWM's untimely arguments, the Appeal must still be dismissed. DWM does not challenge the Board's ruling that the second amendment to Contention 2 was inadmissible under 10 C.F.R. § 2.309(f)(1)(vi) for failing to raise a genuine dispute with the Application. It only challenges the Board's ruling that the second amendment was outside the scope of the proceeding under 10 C.F.R. § 2.309(f)(1)(iii). Of course, failure to satisfy any *one* of the contention admissibility requirements in § 2.309(f)(1) renders a

³⁸ LBP-19-4 at 98.

³⁹ *Id.* at 98-100.

⁴⁰ *Id.* at 98.

⁴¹ Appeal at 22.

contention inadmissible.⁴² Accordingly, notwithstanding DWM’s Appeal, Contention 2 remains inadmissible for failing to raise a genuine dispute with the application under § 2.309(f)(1)(vi) – an independent basis on which the Board dismissed the Contention and which DWM has not challenged.

Finally, even if the Commission decides to address the arguments in the Appeal, DWM still has shown no error or abuse of discretion. DWM’s argument rests entirely on its notion that the Board “profoundly misunder[stood]” the scope of the licensing proceeding when the Board stated that DWM’s allegations regarding financial assurances for later phases of the project are outside the scope of this proceeding because the Application seeks approval of only the first of twenty potential phases.⁴³ It is clear on its face, however, that the Board correctly understood the scope of this proceeding. The ER expressly states that the Application seeks a license only for the first phase of the CISF project, and that Holtec may request license amendments for 19 subsequent expansion phases to be completed over the course of 20 years:

Holtec is proposing to construct and operate Phase 1 of the CIS Facility within an approximately 1,040 acre parcel. Holtec is currently requesting authorization to possess and store 500 canisters of SNF containing 8,680 metric tons of uranium (MTUs), which includes spent uranium-based fuel from commercial nuclear reactors as well as a small quantity of spent mixed-oxide fuel. If the requested license is issued by the NRC, Holtec anticipates subsequently requesting an amendment to the license to request authorization to possess and store SNF containing an additional 500 canisters for each of 19 subsequent expansion phases to be completed over the course of 20 years.⁴⁴

⁴² *Entergy Nuclear Operations, Inc.* (Indian Point, Unit 2), CLI-16-5, 83 N.R.C. 131, 136 (2016) (“Our case law makes clear that these [2.309(f)(1)] standards are ‘strict by design’ and that failure to fulfill any one of these requirements renders a contention inadmissible.” (footnote omitted)).

⁴³ Appeal at 21.

⁴⁴ HI-STORE CIS Facility Environmental Report, Rev. 3 at 14 (Nov. 2018) (NRC ADAMS Accession No. ML19016A493).

Given this express statement by Holtec, DWM cannot plausibly sustain an argument on appeal that the Board erred when it found that “Holtec’s license application seeks approval of only the first of twenty potential phases.”⁴⁵

Finally, DWM’s arguments regarding NEPA⁴⁶ do not support the Appeal. DWM is appealing the Board’s ruling regarding what financial assurances Holtec is required to provide. Financial assurance is a safety issue, not a NEPA issue.⁴⁷ DWM’s NEPA discussion relates to the type of environmental impacts that must be considered.

For these reasons, the Commission should reject DWM’s Appeal with respect to Contention 2.

3. Contention 3 (Low-Level Radioactive Waste)

In the portions of Contention 3 relevant to the Appeal, DWM claimed that the ER underestimated, and therefore failed to consider, the environmental impacts of used metal canisters that would have to be disposed of as low level radioactive waste (“LLRW”) and LLRW created in the event leaking or otherwise damaged casks carrying spent fuel are delivered to the CISF site.⁴⁸ The Board dismissed the Contention, finding that the ER “appropriately relies on the Continued Storage GEIS” and, therefore, DWM’s “complaint amounts to an impermissible attack on the NRC’s regulations.”⁴⁹

⁴⁵ LBP-19-4 at 98.

⁴⁶ Appeal at 24-25.

⁴⁷ Compare 10 C.F.R. §§ 72.22 and 72.30 with § 72.34.

⁴⁸ Petition to Intervene at 37-38.

⁴⁹ LBP-19-4 at 102.

The Appeal challenges the Board’s finding that Holtec properly relied on the Continued Storage GEIS to address the topics of spent fuel repackaging and disposal of spent fuel casks after repackaging.⁵⁰ DWM’s entire argument is that the Continued Storage Rule “expressly allows consideration of environmental effects in a ISFSI licensing proceeding that will occur during the license term.”⁵¹ First, that argument merely recites the position that DWM took before the Board, even to the extent of quoting the same section (10 C.F.R. § 51.23) of the Continued Storage Rule that it quoted to support its position below.⁵² Reciting earlier positions, without more, is insufficient to sustain an appeal.⁵³ Second, DWM fails to allege an error, because it misses the point of the Board’s ruling. The Board did not find that environmental impacts cannot be considered in individual licensing proceedings. Instead, the Board found that the ER in this proceeding “appropriately relies on the Continued Storage GEIS” to address environmental impacts relating to repackaging and the disposal of spent fuel casks after repackaging that DWM raised.⁵⁴ Indeed, as Holtec showed in its Answer -- and as the Board agreed⁵⁵ -- the detailed evaluation in the Continued Storage GEIS directly discusses the environmental impacts of all the information that DWM claims was not evaluated.⁵⁶ Third, the Board clearly did not err in applying well-settled legal precedent to conclude that Commission regulations, such as the Continued Storage Rule, cannot be challenged in an adjudicatory proceeding.⁵⁷

⁵⁰ Appeal at 24.

⁵¹ *Id.*

⁵² See DWM Oct. 16 Reply at 34, 39.

⁵³ See *Texas Utilities Electric Co.*, CLI-93-10, 37 N.R.C. at 198.

⁵⁴ LBP-19-4 at 102.

⁵⁵ *Id.*

⁵⁶ Answer at 37-39.

⁵⁷ See 10 C.F.R. § 2.335; *Pac. Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-21, 82 N.R.C. 295, 302 (2015) (“Contentions that challenge an agency rule or regulation without a waiver, in addition to being expressly prohibited by 10 C.F.R. § 2.335(a), are outside the scope of the proceeding.”)

For these reasons, the Commission should reject the Appeal regarding Contention 3.

4. Contention 4 (Continued Storage Rule)

As to Contention 4, DWM claimed that the ER's reliance on the Continued Storage GEIS was improper because: (1) the CISF as proposed does not have a dry transfer system ("DTS"); and (2) Holtec is proposing a "return to sender" approach to address potentially faulty containers.⁵⁸ DWM also claimed that Holtec's environmental analysis should have been more detailed and site-specific, because Holtec allegedly "[did] not qualify" for treatment under the GEIS.⁵⁹

The Board rejected Contention 4, finding that its claims "do not demonstrate a genuine dispute with the application on a material issue of law or fact" as required under 10 C.F.R. § 2.309(f)(1)(vi).⁶⁰ The Board found that site-specific evaluations, such as the one performed by Holtec in its ER, do not need to reanalyze the impacts of continued storage because "that is already covered by the [Continued Storage] GEIS and requires a waiver to challenge."⁶¹ The Board added that Holtec's ER contained the necessary site-specific impact analysis for the period of the proposed activity.⁶² The Board also found that the Continued Storage GEIS did not require an analysis of a DTS system at this time because Holtec does not intend to build one during the initial license term.⁶³

The Appeal fails to demonstrate how the Board erred or abused its discretion. Although DWM claims that "the ASLB must be reversed" with respect to Contention 4, it does not challenge

(footnote omitted); *N. Atl. Energy Serv. Corp., et al.* (Seabrook Station, Unit 1), CLI-99-6, 49 N.R.C. 201, 217 n.8 (1999) ("We wish to make clear, however, that a petitioner in an individual adjudication cannot challenge generic decisions made by the Commission in rulemakings." (citing *Massachusetts v. NRC*, 924 F.2d 311, 330 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991))).

⁵⁸ Petition to Intervene at 47-48.

⁵⁹ *Id.* at 49.

⁶⁰ LBP-19-4 at 104.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 104-05.

– or even cite – any particular aspect of the Board’s ruling. The Appeal makes no specific claims or allegations as to how the Board was incorrect when it found that Contention 4 failed to raise a genuine material issue. It does not claim that the Board erred in finding that site-specific evaluations need not re-analyze impacts already analyzed by the Continued Storage GEIS, nor does it challenge the Board’s finding that a waiver was necessary for DWM to make such claims in this proceeding. Finally, the Appeal does not address the Board’s conclusion that a DTS need only be addressed if Holtec pursues a DTS in a separate action.

Instead of clearly specifying an error in the Board’s decision,⁶⁴ the Appeal merely vaguely claims that the Board “may not segment consideration of environmental effects.”⁶⁵ But DWM does not cite supporting precedent, nor does it explain what analysis the Board allegedly improperly segmented. The Appeal also cites the general principle that a NEPA analysis must analyze environmental impacts that are not remote and speculative,⁶⁶ but fails to raise a specific challenge as to how the Board’s decision regarding Contention 4 erred in applying that principle. Finally, the Appeal claims that “Holtec cannot consider the probability of leaking or contaminated canisters arriving at the CISF to be zero; it cannot discount the need for a DTS well before the end of the first 100 years of operations”⁶⁷ Again, DWM provides no basis to support its claims regarding the probability of leaking or contaminated canisters or what Holtec allegedly “cannot” do. DWM is

⁶⁴ See *Advanced Medical Systems, Inc.*, CLI-94-6, 39 N.R.C. at 297-98, citing *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 N.R.C. 1, 9 (1990) (emphasis added) (“The appellant bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant’s claims.”).

⁶⁵ Appeal at 24.

⁶⁶ *Id.* at 25.

⁶⁷ *Id.*

merely making statements rather than challenging with specificity some aspect of the Board’s ruling regarding contention admissibility that it asserts was in error.

For these reasons, the Commission should deny the Appeal regarding Contention 4.

5. Contention 7 (Start Clean/Stay Clean)

Contention 7 claimed that the ER should contain an analysis of Holtec’s start clean/stay clean policy, alleging that the policy could pose a risk of harm to the public and citing the need for a DTS at the Holtec facility.⁶⁸ The Board rejected Contention 7 as lacking sufficient factual or expert support, consistent with the Commission decision in *Private Fuel Storage*, CLI-04-22, 60 N.R.C. 125, at 136–37 (2004) (“*PFS*”).⁶⁹ On appeal, DWM argues that

in *PFS*, the NRC had already generically determined that an accidental canister breach was not credible, unlike Holtec’s situation. Holtec believes a breach scenario is sufficiently credible that it intends to have a “start clean/stay clean” policy with “return to sender” as an option. Notably, the Holtec ER does not mention 10 C.F.R. § 71.47, which provides external radiation standards for all packages. That regulation itself cautions that “[e]ven this radiation limit is not absolute; it can be exceeded if certain additional conditions are met.” 10 C.F.R. § 71.47(b).⁷⁰

This argument falls short of the basic requirements for an appeal and fails to point out any errors in the Board’s decision.⁷¹

The Board determined that DWM failed to provide any factual or expert support establishing that there could be a risk of harm from the transport of damaged canisters.⁷² Specifically, DWM had failed to show how (1) the spent fuel would leave the reactor site leaking or damaged (given NRC-

⁶⁸ See Petition to Intervene at 62-64; Appeal at 25-26.

⁶⁹ LBP-19-4 at 113-14.

⁷⁰ Appeal at 26.

⁷¹ *Shieldalloy Metallurgical Corp.*, CLI-07-20, 65 N.R.C. at 503 (regarding appeal of denied intervention petitions under 10 C.F.R. § 2.311) (citing *AmerGen Energy*, CLI-06-24, 64 N.R.C. at 121).

⁷² LBP-19-4 at 113.

approved quality assurance programs); (2) the spent fuel canister would become credibly damaged during transport, such that dose limits would be exceeded; and (3) the sequestration sleeve would be an inadequate remedy in the event of damage.⁷³ In its Appeal, DWM fails to show how Contention 7 contained the requisite factual or expert support such that the Board's decision would amount to an error or abuse of discretion.

DWM first attempts to distinguish Holtec's Application from *PFS* by alleging that there is no generic NRC determination that a cask breach is not credible for Holtec.⁷⁴ However, the generic determination in *PFS* was not specific to PFS's facility. Rather, that determination applies to a number of different storage systems.⁷⁵ Additionally, in Holtec's specific case, the NRC has approved the HI-STAR 190 package based on Holtec's showing that the casks maintain structural integrity after a variety of hypothetical accident tests.⁷⁶ DWM then argues that the mere existence of Holtec's start clean/stay clean policy shows that a breach is credible.⁷⁷ However, *PFS* also had a start clean/stay clean policy,⁷⁸ and DWM does not explain why Holtec's policy should warrant different treatment than PFS's policy. Finally, DWM mentions that the ER does not reference 10 C.F.R. § 71.47.⁷⁹ However, DWM does not explain how this provides the missing factual or expert support for the possible existence of damaged canisters or any subsequent risk of harm.

For these reasons, the Commission should deny the Appeal regarding Contention 4.

⁷³ *Id.*

⁷⁴ Appeal at 26.

⁷⁵ *See PFS*, CLI-04-22, 60 N.R.C. at 137 n.45.

⁷⁶ *See* HI-STAR 190 Package Safety Evaluation Report, Rev. 0 at 23 §2.9 (Aug. 8, 2017) (NRC ADAMS Accession No. ML17222A083).

⁷⁷ Appeal at 26.

⁷⁸ *See PFS*, CLI-04-22, 60 N.R.C. at 133.

⁷⁹ Appeal at 26.

6. Contention 9 (Transportation Routes)

Contention 9 claimed that the discussion of transportation routes in Holtec's ER was inadequate and incomplete, and that NEPA and the Commission's regulations require additional disclosures of probable transportation routes, whether by barge, highway or rail.⁸⁰ The Board, however, properly rejected Contention 9 for failing to raise a genuine dispute with the Application.⁸¹ As the Board correctly pointed out, DWM did not demonstrate how NEPA or the Commission's regulations require a specific assessment of possible transportation routes, noting that "[n]one of the legal authority cited by [DWM] . . . specifies that a certain number of transportation routes must be analyzed in an applicant's Environmental Report, let alone every conceivable [] route."⁸² The Board added that Holtec's evaluation of three representative routes was consistent with past NRC practice in similar cases.⁸³

The Appeal does not allege any error or abuse of discretion. It simply recites DWM's prior arguments that Contention 9 is a "contention of omission"⁸⁴ and that NEPA and the Commission's regulations require an analysis of the environmental impacts of transportation.⁸⁵ The "mere recitation of [DWM's] prior positions in [this] proceeding" and "stat[ing] [its] general disagreement with" the Board's decision "is no substitute for a brief that identifies and explains the errors in" the Board's ruling.⁸⁶

⁸⁰ Petition to Intervene at 66-68.

⁸¹ LBP-19-4 at 115-16.

⁸² *Id.*

⁸³ The Board also found outside the scope of this proceeding DWM's additional argument that public and emergency response officials need unconditional disclosure of probable transportation routes. LBP-19-4 at 116.

⁸⁴ See Petition to Intervene at 67; Appeal at 26.

⁸⁵ See Petition to Intervene at 67; Appeal at 26.

⁸⁶ *Texas Utilities Electric Co.*, CLI-93-10, 37 N.R.C. at 198.

While the Appeal describes the Board’s rulings,⁸⁷ it fails to challenge their substance. For example, DWM does not show – nor could it – that NEPA or the Commission’s regulations require an assessment of a specific number of transportation routes. Nor does DWM claim that the Board incorrectly applied prior NRC practice when it concluded that the ER’s analysis of three representative transportation routes was sufficient.

Rather than challenging the Board’s actual rulings, the Appeal cites a number of cases allegedly supporting the proposition that “[s]eparating consideration of the transportation component from the storage component of the Holtec project segments a single project into smaller projects and defies effective analysis and public understanding as required by NEPA.”⁸⁸ That proposition (even if accurate, which it is not) is wholly unrelated to the Board’s findings regarding Contention 9, and incorrectly describes the Board’s actions. Far from “separating consideration of the transportation component from the storage component,” the Board recognized that Holtec’s ER evaluated three representative transportation routes – and concluded that this was both sufficient to satisfy NEPA and consistent with Commission precedent. The Appeal makes no specific argument as to why those conclusions were in error.

For these reasons, the Commission should deny the Appeal regarding Contention 9.

7. Contention 11 (Transportation and Storage Security Risks)

Contention 11 claimed that the ER should contain an analysis of terrorist attacks as an environmental impact.⁸⁹ In addition, DWM alleged 28 sub-contentions on a variety of additional

⁸⁷ Appeal at 27.

⁸⁸ Appeal at 27.

⁸⁹ Petition to Intervene at 70; Appeal at 28.

issues,⁹⁰ purportedly supported by a report from Dr. James Ballard.⁹¹ The Board rejected Contention 11 as outside the scope of this proceeding and failing to raise a genuine dispute with the Application.⁹² On appeal, DWM argues that “NEPA and AEA regulations require far greater security consciousness than is evidenced in the Holtec application. 10 C.F.R. § 72.122(b); 10 C.F.R. § 72.40(a)(5); 10 C.F.R. § 72.40(a)(13); 10 C.F.R. § 72.90; 10 C.F.R. § 72.98; 10 C.F.R. § 51.45(b) and (c).” This argument falls short of the basic requirements for an appeal and fails to point out any errors in the Board decision.⁹³

Nor could DWM point to any such errors, as the Board correctly rejected Contention 11. The claim that the ER should analyze terrorist attacks ignores Commission precedent that limits the NEPA analysis of terrorist attacks to states within the Ninth Circuit.⁹⁴ The Appeal does not show how the Board’s adherence to this precedent constitutes an error or law or abuse of discretion.

Additionally, because the sub-contentions failed to address or challenge the Application, the Board found that the sub-contentions failed to raise a genuine dispute with the Application. The Appeal does not even attempt to show any error in this decision by demonstrating how its original contentions challenged the Application.

For these reasons, the Commission should deny the Appeal regarding Contention 11.

⁹⁰ Petition to Intervene at 79-88.

⁹¹ James D. Ballard, Ph.D., Expert Report, *Holtec HI-STORM UMAX Interim Storage Facility (a.k.a. CISF): Human Initiated Events (HIE), Transportation of the Inventory and Storage of Highly Radioactive Waste Materials* (Sept. 14, 2018) (NRC ADAMS Accession No. ML18257A335).

⁹² LBP-19-4 at 119-120.

⁹³ *Shieldalloy Metallurgical Corp.*, CLI-07-20, 65 N.R.C. at 503 (regarding appeal of denied intervention petitions under 10 C.F.R. § 2.311) (citing *AmerGen Energy*, CLI-06-24, 64 N.R.C. at 121).

⁹⁴ *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 N.R.C. 124, 129 (2007).

8. Contention 14 (Alleged Material False Statement)

Late-filed Contention 14 alleged that Holtec made a material false statement in the Application that “title to the waste to be stored at the CIS facility would be held by DOE and/or the nuclear plant owners.”⁹⁵ According to DWM, the material false statement was revealed by a January 2, 2019 Holtec press release entitled “Reprising 2018.”⁹⁶ The Board granted DWM’s motion to file Contention 14 out of time, but rejected it as inadmissible on the same grounds as it did Sierra Club Contention 26, given that the two contentions were essentially identical.⁹⁷ Although the Board incorrectly found that DWM had demonstrated good cause for its untimely filing,⁹⁸ the Board correctly ruled Contention 14 is inadmissible. The Board found that any violation of Section 186 requires a willful misrepresentation, and that “[n]othing in ‘Reprising 2018’ demonstrates a misrepresentation in Holtec’s license application, willful or otherwise.”⁹⁹ The Board added that it

⁹⁵ DWM’s Contention 14 at 1 (Jan. 17, 2019) (NRC ADAMS Accession No. ML19017A349).

⁹⁶ *Id.*

⁹⁷ LBP-19-4 at 123.

⁹⁸ Applying the same analysis used to grant Sierra Club’s late contention, the Board granted the motion to file DWM’s late Contention 14 because the Board “interpret[ed] ‘materially different’ new information from the standpoint of a reasonable petitioner,” and that the statement in Reprising 2018 “appears to contradict information in the application.” LBP-19-4 at 82. The Commission should reverse the Board’s ruling here. First, the Board cites to no precedent for its holding that it should evaluate materially different information from the standpoint of a “reasonable petitioner.” But even if that were an appropriate standard to apply, DWM interpretation of the statement in the article is anything but reasonable. Holtec argued that DWM failed to demonstrate that the information presented in the Reprising 2018 article was either previously available or materially different from information previously available. Late-filed Sierra Club Contention 16 and DWM Contention 14 at 3-4. The Reprising 2018 article said nothing about DOE taking title to the spent nuclear fuel, and DWM can not manufacture materially different information by mischaracterizing the article. *Id.* at 4. Indeed, the good cause standards in 10 C.F.R. 2.309(c) would be rendered meaningless if a petitioner could claim the existence of new information based only on its “wild imagination.” *Id.* Holtec also noted that that the claims raised in Contention 14 were the same allegations that DWM had been making throughout the proceeding, and therefore were anything but new. *Id.* at 4-5. Finally, the statement cited by DWM from the Reprising 2018 article was consistent with information present in the Holtec application (at SAR Rev. 0C at PDF p. 21) that the “HI-STORE CIS will be built in several stages of storage system groups *to correspond to the (expected) increasing need from the industry and the U.S. government.*” *Id.* at 5 (emphasis added). DWM could have previously challenged this statement, and provided no good cause for its failure to do so. *Id.* at 5. For all of these reasons, the Commission should reject Contention 14 for the independent reason that DWM failed to show good cause for its untimely filing.

⁹⁹ LBP-19-4 at 83.

would not assume that Holtec would try to contract directly with DOE to store spent fuel, which “would be unlawful . . . under the NWPA as currently in effect,” and nor would it “assume that DOE would be complicit in a violation of the NWPA.”¹⁰⁰

On appeal, DWM shows no error or abuse of discretion by the Board, and merely repeats the arguments it made before the Board.¹⁰¹ The only aspect of the Board’s ruling cited in the Appeal is the Board’s statements that it would not assume that (1) Holtec would try to contract directly with DOE to store spent fuel, which would be presently unlawful under the NWPA; or (2) that DOE would be complicit in any violation of the NWPA. DWM merely asserts that the Board’s ruling “allows Holtec to escape with an astonishingly belated admission of its counsel,” Holtec “admitted that which was obvious to all,” and “[t]his matter should be remanded for adjudication.”¹⁰² Nowhere does DWM confront, let alone show any error in, the multiple bases on which the Board ruled Contention 14 inadmissible. DWM’s “mere recitation of [its] prior positions in [this] proceeding” and “stat[ing] [its] general disagreement with” the Board’s decision ““is no substitute for a brief that identifies and explains the errors in”” the Board’s ruling.¹⁰³

For these reasons, the Commission should deny the Appeal regarding Contention 14.

B. The Board Correctly Denied DWM’s Standing

1. The Board Correctly Found DWM was not Entitled to Standing

As discussed below, DWM is unable to point to any error of law or abuse of discretion in LBP-19-4’s denial of DWM’s standing and heavily relies on new facts and arguments introduced on

¹⁰⁰ *Id.* at 84-85 (footnote omitted).

¹⁰¹ Appeal at 29-30.

¹⁰² *Id.* at 30.

¹⁰³ *Texas Utilities Electric Co.*, CLI-93-10, 37 N.R.C. at 198 (quoting *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-92-3, 35 N.R.C. 63, 66 (1992)).

appeal. This alone is fatal to DWM’s Appeal. However, beyond these defects, the Commission should affirm LBP-19-4 because the Board’s denial of DWM’s standing was correct and consistent with Commission precedent.

In its pleadings, DWM based standing on a number of substantively identical form letters from the members of its constituent groups, each declaring, with slight variation, that their “home/place of work/place of recreation” is some number of miles from a “rail trackage/highway transport route or barge shipment” which the member believes is “likely” to be used to transport radioactive waste based on the member’s “stud[y] [of] Department of Energy maps of rail and highway transportation routes.”¹⁰⁴ These declarations do not identify the routes to which they refer, specify what maps were examined or their relevance, nor explain why they believed these routes are “likely” to be used.¹⁰⁵

Holtec and the NRC Staff both opposed standing, arguing that such vague and speculative pleadings failed to show a concrete injury-in-fact sufficient for traditional standing, that licensing board and Commission decisions have consistently denied standing where based exclusively on proximity to transportation routes, and that DWM did not explain why the unspecified transport routes might be used to ship waste to the CISF.¹⁰⁶ Holtec additionally argued that DWM failed to demonstrate any “[obvious] potential for offsite consequences” at its members’ respective distances

¹⁰⁴ See Member Declarations of Citizens’ Environmental Coalition, Decl. of Thomas Ellis at 2, ¶ 4 (Sept. 6, 2018).

¹⁰⁵ In its Reply, DWM attempted to rehabilitate these declarations by explaining that it had relied on routing maps prepared by the State of Nevada for the Yucca Mountain proceeding, and “reasoned that due to the overweight nature of SNF casks in transport, only the highest class, best-maintained trunk railroad lines would be used” for SNF shipments. DWM Oct. 16 Reply at 8. However, DWM still did not specify any particular routes, explain the relevance of the DOE maps, nor justify their presumption as to why only “trunk railroad lines” would be used.

¹⁰⁶ Holtec Oct. 9 Answer at 13-22; Staff Oct. 9 Answer at 14-18.

from the potential transport routes.¹⁰⁷ NRC Staff also noted that DWM’s claims were insufficiently particularized.¹⁰⁸

The Board correctly denied DWM standing, holding that “proximity to potential transportation routes . . . [was] too remote and speculative an interest on which to establish standing.”¹⁰⁹ Citing extensive Commission precedent, the Board held that mere geographic proximity to radioactive material transportation routes has consistently been found insufficient to demonstrate standing.¹¹⁰ The Board explained that, as other licensing boards have found, the “fact that additional radioactive waste will be transported if the NRC licenses a project does not ipso facto establish that there is a reasonable opportunity for an accident to occur at any location, or for the radioactive materials to escape because of accident or the nature of the substance being transported.”¹¹¹

The Board’s finding should be upheld. First, DWM’s claims of standing are too vague to satisfy the Commission’s requirements. To avail oneself of the Commission’s proximity-plus presumption, a petitioner must provide “*specificity concerning the nature, extent, and duration of [its] contacts with the area surrounding the proposed site*” and the lack of such specificity “is a

¹⁰⁷ Holtec Oct. 9 Answer at 20.

¹⁰⁸ NRC Staff Oct. 9 Answer at 16-17 (explaining that “generalized grievance[s]” shared by all people or a large class of people are insufficient to support standing).

¹⁰⁹ LBP-19-4 at 14.

¹¹⁰ *Id.* at 14-15. While DWM relies heavily on the board’s finding in *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 N.R.C. 403 (2001), which found standing based on the possibility of injuries resulting from transportation of mixed oxide fuel, that case did not involve geographic proximity to transportation routes, but involved physical proximity to shipments during transport. In *Savannah River*, the petitioner was able to show, with specificity, a reasonable possibility they could be stuck in close proximity to a shipment during transport and was able to show the specific dose they would receive in such a situation, including showing the specific routes over which they and MOX fuel shipments would both travel regularly. Here, DWM has made no such showing. Moreover, the Board appropriately distinguished *Savannah River* and cited more recent precedent which cast it into question.

¹¹¹ *Id.* at 15 (quoting *N. States Power Co.* (Pathfinder Atomic Plant), LBP-90-3, 31 N.R.C. 40, 43 (1990) (quotations omitted)).

sufficient basis to reject a claim of standing.”¹¹² Furthermore, “[i]n a materials licensing case . . . a petitioner must show *more* than that he lives or works within a certain distance of the site where materials will be located – *he must show a plausible mechanism through which those materials could harm him.*”¹¹³ DWM’s generic allegations that its members “live/work/recreate” some number of miles from an unnamed “likely” transport route, and could be injured by a variety of generic accident scenarios, fall far short of this standard. This in itself is sufficient justification for the Board to deny standing.

Further, as the Board correctly noted, geographic proximity to potential radioactive waste transportation routes is insufficient to demonstrate standing. The Commission has explained that “mere geographical proximity to potential transportation routes is insufficient to confer standing; instead, . . . *Petitioners must demonstrate a causal connection between the licensing action and the injury alleged.*”¹¹⁴ The pleadings below lack such a causal connection. The fact that DWM, without basis, merely “described threats of harm of both a ‘routine’ as well as ‘non-routine’ sort from the radioactive materials in the canisters,”¹¹⁵ was not enough to show that its standing claim was based on more than just proximity to transport routes.¹¹⁶ Accordingly, under both the Commission’s traditional standing principles and the proximity-plus presumption, LBP-19-4 correctly held that DWM lacks standing.

¹¹² *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 N.R.C. 133, 139 (2010); *see also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 N.R.C. 318, 325 (1999) (“[I]ntervenors who fail to provide specific information regarding either the geographic proximity or timing of their visits will only complicate matters for themselves.”).

¹¹³ *U.S. Army Installation Command* (Schofield Barracks, Oahu, Hawaii, and Pohakuloa Training Area, Island of Hawaii, Hawaii), CLI-10-20, 72 N.R.C. 185, 188-89 (2010) (emphasis added) (footnote omitted).

¹¹⁴ *U.S. Department of Energy* (Plutonium Export License), CLI-04-17, 59 N.R.C. 357, 364 n.11 (2004) (citations and quotations omitted) (emphasis added).

¹¹⁵ Appeal at 16.

¹¹⁶ *Id.* 16-17.

2. **DWM Has Identified No Errors of Law or Abuse of Discretion that Require Redress**

The Commission should affirm the Board’s finding that DWM lacks standing because the Appeal fails to identify any error or abuse of discretion which might justify the Commission overruling the Board’s decision. As discussed *supra*, the Board’s “case-by-case” analysis appropriately characterized the facts set forth by DWM and correctly applied prior Commission precedent in denying standing.¹¹⁷

The Appeal challenges LBP-19-4 on the grounds that it “is based on a defective grasp of the scope of Holtec’s present and projected customer base, a labored reading of standing principles, and the unwarranted rejection of precedent conducive to a finding of [DWM’s] standing.”¹¹⁸ DWM goes on to repeat its prior standing arguments, criticizes the Board for not considering “evidence” not actually presented in DWM’s initial pleadings, and disputes the weight to be given to the orders upon which the Board relied. However, DWM nowhere “points out the errors in the Board’s decision to any error of law or abuse of discretion” or “illuminate[s] the bases” for an exception to the Board’s decision.

Further, even if DWM had sufficiently explained its members’ proximity to potential transport routes (which, as discussed, it did not), it was still within the Board’s discretion to find that this proximity was insufficient to create an “obvious potential for offsite consequences.” DWM has not shown that the Board’s analysis strayed outside the discretion afforded to a licensing board in evaluating proximity-plus standing. Accordingly, DWM gives no reason for the Commission to revisit the Board’s findings, and the Commission should reject DWM’s Appeal.

¹¹⁷ LBP-19-4 at 14.

¹¹⁸ Appeal at 5.

3. DWM's New Facts and Arguments Must be Rejected

As discussed, DWM did not describe their members' activities or contacts with the alleged transportation routes, explain why the routes might be used to transport SNF, and did not specify what routes were referenced. On appeal, DWM attempts to rehabilitate its deficient pleadings by presenting new facts. For example, DWM claims that several Don't Waste Michigan members "attested that they reside from 2.5 to 6 miles from *the only existing trunk rail line for transport of SNF from the Fermi 2 nuclear plant*, identified by DOE near Monroe, Michigan."¹¹⁹ However, these members attested no such thing. Only one even mentioned the Fermi plant, and that was to state the distance from his home and "drinking supply" to the plant.¹²⁰ Regarding transport routes, this member provided the same generic reference as everyone else (i.e. "rail transport route is within six (6) miles of my home").¹²¹

Similarly, DWM argues that had the Board "review[ed] and appreciate[d] the significance of the routes appearing on the maps" the Board would have realized that one of Nuclear Energy Information Service's member's home in Glenview, Illinois, is "due south of the Port of Milwaukee" which is a "likely point of delivery of HLRW barges" from Point Beach and Kewaunee nuclear plants, and so the "rail line running north-south near Glenview . . . will see considerable SNF transport."¹²² DWM presumably believes the Board should have deduced this based solely on the

¹¹⁹ *Id.* at 10 (emphasis in the original) (footnote omitted).

¹²⁰ *See* Member Declarations of Don't Waste Michigan, Citizens for Alternatives to Chemical Contamination, and Nuclear Energy Information Service, Decl. of Michael J. Keegan at 2, ¶ 4 (Sept. 13, 2018).

¹²¹ *Id.*

¹²² Appeal at 11.

member's address and footnotes with hyperlinks to 65 pages of railroad maps prepared for an unrelated proceeding, as DWM's declarations and initial pleadings lack any of these other facts.¹²³

Finally, DWM's argument that "Holtec [h]as [e]stablished [c]ustomer [r]elationships" is also entirely new and was never presented below. This argument is surprising, given that DWM complained that the lack of routing maps in the ER prevented it from identifying the rail lines, and in fact insinuated that the lack of maps indicates that Holtec *does not and will not* have any customers.¹²⁴ Now DWM claims the Board should have known the specific rail lines over which SNF will travel based on Holtec's ownership of certain sites for decommissioning.¹²⁵ If Holtec's "customer relationships" are "established," DWM has no excuse for not presenting this argument below where the Board could have considered it. Having failed to do so, this argument should be rejected.

4. DWM's Theory of Standing Lacks Particularity

Finally, consistent with the argument made below by NRC Staff, standing should be denied because DWM's alleged injuries are too generalized to support standing.¹²⁶ As noted by NRC Staff a "generalized grievance shared in substantially equal measure by all or a large class of citizens" is insufficient for standing.¹²⁷ The Commission has explained that "if petitioners' asserted harm is a

¹²³ For example, the Petition to Intervene and the Reply both lack any mention of the Port of Milwaukee, the Kewaunee or Point Beach nuclear plant, or a claim that SNF from these plants will be moved by barge across Lake Michigan.

¹²⁴ *See, e.g.*, DWM Oct. 16 Reply at 7-8 ("Perhaps the real reasons that only two specific routes have been identified are that . . . utilities are hesitant to sign a contract to transport waste to [the CISF]."). Indeed, while DWM quotes the Board as stating that "Holtec has no customers", Appeal at 7, what the Board actually said is that "Holtec's proposed facility as yet has no customers". LBP-19-4 at 15. There is obviously a difference between Holtec having customers and the CISF having customers.

¹²⁵ Appeal at 6-7.

¹²⁶ NRC Staff Oct. 9 Answer at 16-17.

¹²⁷ *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 N.R.C. 167, 174 (1992).

generalized grievance shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.”¹²⁸

That is the case here—if DWM’s theory of standing were accepted, it would mean that practically anyone, anywhere, would have standing in any licensing proceeding that might involve transportation of radioactive materials, so long as they lived within several miles of a highway or railroad. For example, if a licensing proceeding were commenced for a new plant in the Northeast, petitioners in the Midwest could claim standing on the theory that one day spent fuel from that plant might travel near their home on the way to an interim or permanent repository. DWM’s claims therefore violate the requirement that grievances be particularized. Accordingly, the Commission should reject DWM’s claims for standing.

¹²⁸ *Edlow Intl. Co. (Agent for Government of India on Application to Export Special Nuclear Material)*, CLI-76-6, 3 N.R.C. 563, 576 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (quotations omitted); citing *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974); *Ex Parte Levitt*, 302 U.S. 633 (1937); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923); *Flast v. Cohen*, 392 U.S. 83, 114 (1968)).

V. Conclusion

For the foregoing reasons, Holtec requests that the Commission deny Don't Waste Michigan et al.'s Appeal.

Respectfully submitted,

/Signed electronically by Jay E. Silberg/

Erin E. Connolly
Corporate Counsel
HOLTEC INTERNATIONAL
Krishna P. Singh Technology Campus
1 Holtec Boulevard
Camden, NJ 08104
Telephone: (856) 797-0900 x 3712
e.connolly@holtec.com

Jay E. Silberg
Michael G. Lepre
Timothy J. V. Walsh
Anne R. Leidich
Sidney L. Fowler
PILLSBURY WINTHROP SHAW
PITTMAN LLP
1200 Seventeenth Street, NW
Washington, DC 20036
Telephone: 202-663-8707
Facsimile: 202-663-8007
jay.silberg@pillsburylaw.com
michael.lepre@pillsburylaw.com
timothy.walsh@pillsburylaw.com
anne.leidich@pillsburylaw.com
sidney.fowler@pillsburylaw.com

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Counsel for HOLTEC INTERNATIONAL

June 28, 2019

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before the Commission

In the Matter of)	
)	Docket No. 72-1051
Holtec International)	
)	
(HI-STORE Consolidated Interim Storage)	ASLBP No. 18-958-01
Facility))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition to Don't Waste Michigan et al.'s Appeal of LBP-19-4 has been served through the EFiled system on the participants in the above-captioned proceeding this 28th day of June, 2019.

/signed electronically by Timothy J. V. Walsh/

Timothy J. V. Walsh