

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)

INTERIM STORAGE PARTNERS LLC)

(Consolidated Interim Storage Facility))

Docket No. 72-1050-ISFSI

ASLBP No. 19-959-01-ISFSI-BD01

October 1, 2019

**INTERIM STORAGE PARTNERS LLC'S ANSWER OPPOSING
SIERRA CLUB'S MOTION TO AMEND CONTENTION 13**

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I. INTRODUCTION

In accordance with 10 C.F.R. § 2.309(c) and (i)(1), Interim Storage Partners LLC (“ISP”), the applicant in the above-captioned proceeding, submits this Answer opposing Sierra Club’s Motion to Amend Contention 13 (“Motion”) and the proposed admission of Amended Contention 13.¹ Sierra Club claims that its amended contention is based on “new information” in the form of four references that are described in Section 3.5.16 of the Environmental Report (“ER”) for ISP’s proposed Consolidated Interim Storage Facility (“CISF”).² Following the Atomic Safety and Licensing Board’s (“Board”) admission of Sierra Club Contention 13 on August 23, 2019,³ ISP supplemented its ER with copies of the references in question.⁴ Sierra Club claims that the

¹ See Sierra Club’s Motion to Amend Contention 13 (Sept. 13, 2019) (ML19256C635); Amended Contention 13 (Sept. 13, 2019) (ML19256C638).

² Motion at 1; Amended Contention 13 at 4.

³ See *Interim Storage Partners LLC* (Consolidated Interim Storage Facility), LBP-19-7, 90 NRC __, __ (slip op. at 56) (Aug. 23, 2019) (admitting Sierra Club Contention 13 as “a contention of omission” as to the various references listed in section 3.5.16 of ISP’s ER).

⁴ Letter from J. Boshoven, ISP, to NRC Document Control Desk, E-55041, “Supplemental Information Regarding References from the ISP Environmental Report (ER) Chapter 3, Description of the Affected Environment, Docket 72-1050 CAC/EPID 001028/L-2017-NEW-0002” (Sept. 4, 2019) (including attachments) (ML19248C915) (“Letter E-55041”). ER Section 3.5.16 refers to six prior ecological studies, listed in five bullets, of the proposed CISF area and nearby areas that are referenced or described in ER Section 3.5. ISP Letter E-55041 transmitted electronic copies of, or provided ADAMS accession numbers for, all of those studies (six reports in total, as there are two

purportedly “new” information in these four documents shows that “statements in Chapter 4 of the ER that there will be no adverse impact on the [Texas horned lizard or the sand dune lizard⁵] or their habitat are demonstrably false.”⁶ It further asserts that the two lizard species “are or likely are present at the [CISF] site and more current scientifically supported surveys should be conducted.”⁷

For the reasons discussed herein, the Board should reject Amended Contention 13. It is Sierra Club’s claims—not the contents of the ER—that are “demonstrably false.” As explained in Sections IV.B and V below, the now-available references that Sierra Club relies on in its filings actually *confirm* the accuracy of the ER, and thus do not provide a valid “basis” for a timely and admissible late-filed contention. In other words, the references contain information that was described or summarized in the ER upon which Sierra Club based its original contention. Accordingly, Sierra Club fails to meet the timeliness standards for new or amended contentions in 10 C.F.R. § 2.309(c)(1)(i)-(ii) because the information underlying Amended Contention 13 is not new and materially different from previously-available information contained in the ER.

Furthermore, in erroneously asserting that the ER is inadequate, Sierra Club: (1) fails to accurately describe the contents of the four references purportedly underpinning its amended contention; (2) alleges discrepancies between those references and the ER that simply do not exist; (3) fails to state, with any specificity, why or how the ER fails to comply with the National Environmental Policy Act (“NEPA”) or the Nuclear Regulatory Commission’s (“NRC”) 10 C.F.R. Part 51 regulations; and (4) does not provide any evidence of its own (other studies, expert opinion,

reports for the neighboring National Enrichment Facility in New Mexico). As discussed further below, Amended Contention 13 cites four of those six references: an ecological assessment from 1997, a species survey from 2004, a supplemental survey from 2007, and an environmental assessment from 2008.

⁵ The sand dune lizard also is referred to as the dunes sagebrush lizard.

⁶ Amended Contention 13 at 4.

⁷ Motion at 2.

etc.) to show that the ER is somehow incomplete or inaccurate. Accordingly, Amended Contention 13 also is inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and (vi) because it lacks adequate factual support and fails to raise a genuine dispute with the ER on a material issue of fact or law.

II. PROCEDURAL HISTORY

On June 8, 2018, ISP requested that the NRC Staff resume its review of a license application for a CISF for spent nuclear fuel in Andrews County, Texas.⁸ On November 13, 2018, the Sierra Club filed a Petition to Intervene and Request for Adjudicatory Hearing, proffering 17 separate contentions.⁹ Sierra Club Contention 13 claimed that ISP’s ER identified two species of concern—the Texas horned lizard and the sand dune lizard—but did not discuss the ecological studies or surveys used to determine the presence of the species at the site and the impact of the project on those species, and did not describe the ecological studies well enough to allow members of the public to access them.¹⁰ Following oral argument in Midland, Texas on July 10-11, 2019, the Board rejected all of Sierra Club’s other contentions, and narrowed and admitted Contention 13 “solely as a contention of omission, insofar as none of the five references in section 3.5.16 of ISP’s [ER] is either sufficiently described to judge its technical adequacy or made publicly available.”¹¹

On September 4, 2019, ISP submitted Letter E-55041 to the NRC Staff.¹² In Letter E-55041, ISP provided supplemental information for ER Chapter 3 (“Description of the Affected Environment”) and transmitted electronic copies of, or provided ADAMS accession numbers for,

⁸ Letter from J. Isakson, ISP, to Director, Division of Spent Fuel Management, NRC, “Submittal of License Application Revision 2 and Request to Restart Review of Application for Approval of the WCS CISF, Docket 72-1050” (June 8, 2018) (ML18166A003).

⁹ Sierra Club Petition to Intervene and Request for Adjudicatory Hearing (Nov. 13, 2018) (ML18317A411) (“Petition”).

¹⁰ *Id.* at 78-79.

¹¹ *ISP*, LBP-19-7, slip op. at 56.

¹² *See* Letter E-55041, *supra* n.4.

the ecological studies referenced in ER Section 3.5.16 (six in total, as there are two for the National Enrichment Facility).¹³ The next day, counsel for ISP also submitted a letter to the Board that was served on all parties through the NRC’s E-filing system, informing them of the submission of Letter E-55041 and providing copies of the referenced studies or their ADAMS accession numbers.¹⁴

Thereafter, on September 9, 2019, ISP filed a motion requesting that the Board dismiss Sierra Club Contention 13 as moot because ISP had provided the studies referenced in ER Section 3.5.16, thereby curing the alleged omission.¹⁵ ISP further requested that the Board terminate the proceeding upon dismissing Contention 13.¹⁶ Sierra Club filed its response on September 12, 2019, arguing therein that the Board should deny ISP’s motion and afford Sierra Club an opportunity to amend its Contention 13 based on the “newly-disclosed” documents.¹⁷ During the Section 2.323(b) consultation process, the NRC Staff agreed that Contention 13 should be dismissed as moot.¹⁸

On September 13, 2019, Sierra Club filed its Motion to Amend Contention 13. It asserts that four of the six documents provided by ISP via Letter E-55041 constitute new information that provides the basis for the amended contention.¹⁹ In short, Sierra Club alleges that the ER falsely claims that the proposed CISF will have no impact on the Texas horned lizard and the sand dune lizard, and that “more current scientifically supported surveys should be conducted.”²⁰

¹³ *See id.*

¹⁴ *See* Letter from P. Bessette, Counsel for ISP, to the Board, “Licensing Board Notification Regarding ISP Letter E-55041” (Sept. 5, 2019) (ML19248C912).

¹⁵ *See* Interim Storage Partner LLC’s Motion to Dismiss Sierra Club’s Contention 13 as Moot and Terminate This Proceeding at 1, 3 (Sept. 9, 2019) (ML19252A322) (“Motion to Dismiss”).

¹⁶ *See id.* at 3-4.

¹⁷ *See* Sierra Club’s Resistance to ISP’s Motion to Dismiss Sierra Club’s Contention 13 at 5 (Sept. 12, 2019) (ML19255G961).

¹⁸ *See* Motion Certification attached to ISP’s Motion to Dismiss.

¹⁹ *See* Motion at 1; Amended Contention 13 at 4.

²⁰ Amended Contention 13 at 3, 4.

ISP timely files this Answer opposing the admission of Amended Contention 13, which, as discussed below, fails to satisfy the NRC's contention timeliness and admissibility standards.

III. SUMMARY OF AMENDED CONTENTION 13 AND ITS SUPPORTING BASES

As proffered by Sierra Club, Amended Contention 13 states as follows:

The ER states that two species of concern, the Texas horned lizard and the dune sagebrush lizard, have been seen at the ISP site or may be present. The ER then makes the unsupported statement that the CIS[F] project will have no impact on the species. The sources on which the discussion of the species [sic] were initially unavailable to the public. They have now been made available, but do not support the allegation in the ER that the CIS[F] project will have no impact on the species, and in fact, they confirm the opposite conclusion. Furthermore, the sources are 11-22 years out of date. The ER does not reference any current studies or surveys. Therefore, the ER is inadequate in describing the affected environment.²¹

The specific "sources" to which Sierra Club refers include the following four documents:

- "Ecological Assessment of the Low Level Waste Depository, Andrews County, Texas," Final Report, Ecology Group (May 1997) ("1997 Report");
- "Habitat Characterization and Rare Species Survey for the Proposed Low Level Waste Repository, Andrews County, Texas," Final Report, Doug Reagan & Associates (Oct. 25, 2004) ("2004 Report");
- "Supplemental Survey to Ecological Assessment of the Low Level Waste Depository, Andrews County, Texas," Final Report – Revision 1, URS Corporation and Doug Reagan (Mar. 2007) ("2007 Report"); and
- "Environmental Assessment Report Prepared for Application for Renewal of Radioactive Material License R04971, Waste Control Specialists LLC, Andrews County, Texas," Revision 0, Waste Control Specialists ("WCS") (July 3, 2008) ("2008 Report").

Sierra Club claims that these four documents collectively show that "the statements in Chapter 4 of the ER that there will be no adverse impact on the two lizard species or their habitat are demonstrably false."²² It further asserts that these documents: (1) are outdated; (2) focused on

²¹ *Id.* at 1.

²² *Id.* at 4.

the WCS Low-Level Radioactive Waste (“LLRW”) disposal facility site; (3) are based on “random” or “casual” observations rather than “credible species survey[s];” and (4) nevertheless “clearly confirm” that the two lizard species of concern and their habitats are present at the CISF site.²³

IV. AMENDED CONTENTION 13 IS UNTIMELY BECAUSE IT FAILS TO SATISFY THE COMMISSION’S “GOOD CAUSE” STANDARD IN 10 C.F.R. § 2.309(c)(1)

A. Sierra Club Must Satisfy the Commission’s Three-Factor “Good Cause” Standard for Amended and New Contentions

Given that the initial deadline for filing contentions in this proceeding has long passed, petitioners seeking to amend their original contentions or proffer new ones must meet the “good cause” standard in 10 C.F.R. § 2.309(c)(1). Under that regulation, “good cause” exists only if the petitioner can show: (i) the information upon which the amended or new contention is based was not previously available; (ii) the information upon which the filing is based is *materially different* from information previously available; and (iii) the filing has been submitted in a timely fashion based on the availability of the subsequent information.²⁴

The Commission does not look favorably upon amended or new environmental contentions made after the initial filing deadline.²⁵ Although such contentions are, in essence, challenges to the Staff’s compliance with NEPA, they must be raised, if possible, in response to an applicant’s ER.²⁶ Otherwise, petitioners “risk the possibility that there will not be a *material* difference between the

²³ *Id.* at 5.

²⁴ 10 C.F.R. § 2.309(c)(1)(i)-(iii) (emphasis added).

²⁵ *See Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 636 (2004); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 272 (2009).

²⁶ *DTE Elec. Co.* (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7 (2015).

application and the Staff’s review documents, thus rendering any newly proposed contention on previously available information impermissibly late.”²⁷

The good cause standard serves “as a check to prevent petitioners from filing new contentions based on new information that is insignificantly different from previously available information.”²⁸ “Previously available information that is newly acquired by the petitioner does not constitute good cause, as ‘new and amended contentions must be *based on new facts* not previously available.”²⁹ Similarly, “previously available information that is newly interpreted by the petitioner does not constitute good cause to file a new contention.”³⁰

B. Sierra Club Has Not Identified Any New and Materially Different Information in Any of the Four Referenced Reports, in Contravention of Section 2.309(c)(1)(i)-(ii)

ISP recognizes that Sierra Club did not have access to the four reports referenced in Amended Contention 13 until September 5, 2019, and that it filed its amended contention just over a week later.³¹ However, that fact alone does not satisfy Sierra Club’s obligation to demonstrate that the specific information or facts from those reports referenced in its Motion and Amended

²⁷ *Id.* (emphasis added). The term “materially,” as used in Section 2.309(c)(1)(ii), “describes the type or degree of difference between the new information and previously available information that a petitioner must establish, and it is synonymous with, for example, ‘significantly,’ ‘considerably,’ or ‘importantly.’” *Fla. Power & Light Co.* (Turkey Point Units 6 and 7), LBP-17-6, 86 NRC 37, 48 (2017) (citations omitted).

²⁸ *Turkey Point*, LBP-17-6, 86 NRC at 48 n.9.

²⁹ *Holtec Int’l* (HI-STORE Consol. Interim Storage Facility), LBP-19-4, 89 NRC __, __ (slip op. at 23-24) (May 7, 2019) (citing *Kan. Gas & Elec. Co.* (Wolf Creek Generating Station, Unit 1), LBP-84-17, 19 NRC 878, 886 (1984) and quoting *Entergy Nuclear Generation Co.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 493 n.70 (2012) (emphasis in original)); see also *Fermi*, CLI-15-1, 81 NRC at 7 (requiring “a material difference between the information on which the contention is based and the information that was previously available”).

³⁰ *Holtec Int’l*, LBP-19-4, slip op. at 87 (citing *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-90-5, 31 NRC 73, 79 (1990) (finding no “good cause” existed for late-filed safety concerns when petitioner “had yet to put the pieces of [the] safety puzzle together” despite previous availability of the information)).

³¹ In this respect, ISP does not challenge Sierra Club’s compliance with 10 C.F.R. § 2.309(c)(1)(iii), insofar as the four reports constitute “subsequent information” within the meaning of that provision. See 10 C.F.R. § 2.309(c)(1)(iii) (requiring that a motion for leave to file a new or amended contention be “submitted in a timely fashion based on the availability of the subsequent information”).

Contention 13 were not previously available *and* are materially different from information contained in ISP’s ER.³² As demonstrated below, Sierra Club has not met its burden here.

As a threshold matter, insofar as Sierra Club claims that the four references in question are “out of date” (notwithstanding its own reliance on those documents), its argument plainly is belated.³³ Although ISP recently provided copies of those references, ER Section 3.5.16 indicated the specific years in which the four reports were prepared.³⁴ If Sierra Club had concerns about the age or vintage of those reports, then it could have raised that concern in its original contention. It failed to do so. Regardless, as discussed below, Sierra Club also fails to identify any new and materially different information in the four references vis-à-vis the contents of the ER. Indeed, it is clear that the ER incorporated key information from those four references. The recent availability of the references themselves does not render that information new and materially different.

1. Sierra Club Has Not Identified Any New and Materially Different Information in the 1997 Report

Sierra Club’s cursory discussion of the 1997 Report fails to identify any new and materially different information. Sierra Club merely asserts that the 1997 Report only considered species within one mile of the core area of the LLRW site, and that the proposed CISF site “is beyond that one mile radius.”³⁵ It further claims that report reflects only “casual observations” of reptiles and amphibians as opposed to a “scientific survey.”³⁶

Neither of these assertions constitutes new and materially different information for purposes of demonstrating good cause under Section 2.309(c)(1). The ER does not specify the exact areal

³² See 10 C.F.R. § 2.309(c)(1)(i)-(ii).

³³ Amended Contention 13 at 1, 5

³⁴ See ER, Rev. 2, Sec. 3.5.16 at 3-40.

³⁵ Motion at 2; Amended Contention at 2.

³⁶ *Id.*

extent of the wildlife surveys described in the 1997 Report; *i.e.*, within one mile of the “core area” depicted in Figure 1 of that report.³⁷ However, the ER states that “[t]he CISF would be located on approximately 130 ha (320 acres) of land just north of and adjacent to the [WCS] LLRW Disposal Facility [WCS Facility] licensed by the TCEQ in accordance with Texas Radioactive Material License No. R04100.”³⁸ ER Figure 1.2-2 (“Project Location”), among other ER figures, shows the proximity of the proposed CISF site to the WCS Facility.³⁹ Furthermore, ER Figure 3.1-3 (“Proposed CISF 1 mile Radius”) clearly shows that the WCS Facility is located within a mile of the proposed CISF site and, hence, within the survey area described in the 1997 Report.⁴⁰

Indeed, a comparison of Figure 1 in the 1997 Report with Figure 1.2-2 in the ER confirms that the surveys documented in the 1997 Report overlap with the area of the current proposed CISF site. Although there have been some changes in surficial features from 1996 to the present day, the major topographical features and roads are readily discernible in both figures. From these figures, it is clear that the “Site 1” survey site (and also possibly the “Site 5” survey site) described in the 1997 Report and shown in Figure 1 thereof overlaps with the current proposed CISF site. Thus, Sierra Club’s claim that “the CIS[F] site at issue in this case is beyond [the] one-mile radius” described in the 1997 Report is factually erroneous.⁴¹ As such, it cannot constitute new and materially different information on which an amended contention properly could be based. Nor can Sierra Club’s

³⁷ See 1997 Report at 3 & 83 (Figure 1, “Sampling sites at the WCS Ranch, Andrews Co., Texas, 1996-1997). Figure 1 of the 1997 Report is attached hereto as **Attachment 1**).

³⁸ ER, Rev. 2, Sec. 1.2 at 1-6.

³⁹ See ER, Rev. 2 at 1-16 (Fig. 1.2-2) (attached hereto as **Attachment 2**).

⁴⁰ See ER, Rev. 2 at 3-87 (Fig. 3.1-3) (attached hereto as **Attachment 3**).

⁴¹ Amended Contention at 2.

inaccurate and incomplete description of the 1997 Report and ER (including the above-referenced figures) provide the factual basis for an admissible contention.⁴²

Sierra Club's claim that the 1997 Report contains only "casual" or "random" observations also is factually unfounded, and thus provides no new and materially different information or the basis for an admissible contention. The 1997 Report, the key findings of which are reflected in the ER,⁴³ explicitly states that an "environmental and ecological *survey* was conducted . . . to provide an unbiased assessment of the native flora and fauna immediately surrounding the core area."⁴⁴ The individual flora and fauna (including reptile) surveys were conducted by a team of five doctoral-level research scientists whose credentials are summarized in the 1997 Report.⁴⁵ Thus, there is zero basis for Sierra Club's suggestion that the surveys lacked scientific validity or rigor.

2. Sierra Club Has Not Identified Any New and Materially Different Information in the 2004 Report

Sierra Club's reliance on the 2004 Report as a putative source of new and materially different information also is misplaced. With regard to this document, Sierra Club states:

The 2004 document, at page 6, states that the sand dune lizard was observed in the area of the LLRW site. Further, the document, at page 7, states that there is no suitable habitat for the sand dune lizard within 1.5 km (1 mi) of the LLRW site. The document goes on to state, however, that suitable sand dune lizard habitat exists west, north, northeast, south, and southeast of the LLRW site. Significantly, the proposed CIS site is just northeast of the LLRW site. In fact,

⁴² *Cf. Ga. Inst. of Tech.* (Ga. Tech Research Reactor), LBP-95-6, 41 NRC 281, 300 (1995) (rejecting a contention based on a mistaken reading of the applicant's Safety Analysis Report); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 (1996) (noting that supporting material provided by a petitioner, including those portions thereof not relied upon, is subject to licensing board scrutiny, "both for what it does and does not show"); *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), LBP-10-24, 72 NRC 720, 750 (2010) ("[M]aterials cited as the basis for a contention are subject to scrutiny by the board to determine whether they actually support the facts alleged.").

⁴³ *Compare* 1997 Report at 15, 81 (noting that "[a]n immature [Texas horned lizard specimen] was observed north of core area May 4 and another immature along Transect 3 September 1") *with* ER, Rev. 2, Sec. 3.5.4 at 3-34 (noting that "[t]he Texas horned lizard has been reported as present on the property controlled by [WCS] by previous surveys").

⁴⁴ 1997 Report at 3 (emphasis added); *see also id.* at 7 ("Five sites were surveyed at the WCS Ranch.").

⁴⁵ *See id.* at 4, 108-09.

the document states, at page 7, that the study area was a 3.1 mile radius of the LLRW site and that the two lizard species occur within that area, and that the area around the LLRW site (which would include the CIS site) should be protected to preserve the habitat for both species.⁴⁶

None of the information contained in the foregoing paragraph from Sierra Club's Amended Contention 13 is new and materially different for purposes of Section 2.309(c)(1)(i)-(ii). The ER contains the following factual statements, all of which are based on, and nearly identical to, statements contained in the 2004 Report:

- Natural habitats in the study area, ***defined as the area within a 5 km (3.1 mi) radius of the proposed CISF***, are mostly shrub land with grassy patches, which are typical of the larger surrounding region. Species observed in these areas are also typical of the region. ***Two species of concern, the Texas horned lizard (*Phrynosoma cornutum*) and sand dune lizard (*Sceloporus arenicolus*), occur within the area.*** The former is widespread in Texas and is considered threatened because of over-collecting, incidental loss, and habitat disturbance. The latter has a specialized habitat that occurs throughout much of the region of the proposed CISF. It is a proposed candidate for protection due to the loss of habitat, primarily due to spraying to remove shinnery oak (*Quercus havardii*) to improve grazing.⁴⁷ (This same statement is contained on page 7 of the 2004 Report.)
- Reptiles observed in the study area include whiptail lizards (*Cnemidophorus sp.*), southern prairie lizard (*Sceloporus undulatus consubrinus*), the sand dune lizard (*Sceloporus arenicolus*), and the western hognose snake (*Heterodon nasicus*).⁴⁸ (The same statement appears on page 6 of the 2004 Report.)
- The sand dune lizard has been reported in the area northwest of the proposed CISF in past site surveys. Habitat characteristics favorable for the species include open sandy blowouts near shinnery oak. As such habitat was found in much of the study area, the species might occur in the area. However, the areas of habitat are small and isolated from each other, so no estimate of actual distribution or abundance could be made on the basis of present surveys. ***Areas west, north, northeast, south, and southeast of the CISF have the potential to be suitable habitat.*** A juvenile lizard, presumably of this species, was captured, photographed, and released from a sandy blowout location approximately 4 km (2.5 mi) southeast of the CISF. The habitat in which the specimen was collected is a small blowout with shinnery oak, sand sage, soapweed, and sparse grasses present at the periphery.⁴⁹ (Nearly identical statements are found on pages 6-7 of the 2004 Report).

⁴⁶ Motion at 2-3; Amended Contention at 3.

⁴⁷ ER, Rev. 2, Sec. 3.5.2 at 3-29 to 3-30 (emphasis added).

⁴⁸ ER, Rev. 2, Sec. 3.5.2.2 at 3-31.

⁴⁹ ER, Rev. 2, Sec. 3.5.4 at 3-34 to 3-35 (emphasis added).

- The Texas horned lizard has been reported as present on the property controlled by Waste Control Specialists by previous surveys. Suitable habitat is present throughout much of the study area, and it is likely that the species is widespread in the region, as reported by previous investigators. None were observed during the October 2004 survey.⁵⁰ (The same statements appear on page 6 of the 2004 Report.)

As the foregoing ER excerpts make clear, the statements in the 2004 Report cited by Sierra Club are not new and materially different information—the *same* statements appear in the ER.

Accordingly, they cannot support a showing of good cause under Section 2.309(c)(1)(i)-(ii).

3. Sierra Club Has Not Identified Any New and Materially Different Information in the 2007 Report

Sierra Club similarly fails to identify any new and materially different information in the 2007 Report. It notes that page 59 of the 2007 Report states that the sand dune lizard does not occur on the site of the WCS LLRW project, but that suitable habitat does occur “in the area around the site.”⁵¹ Sierra Club further notes that a table on page 60 of the 2007 Report lists the Texas horned lizard as being observed on the LLRW site.⁵² As explained below, neither of these observations regarding the 2007 Report constitutes new and materially different information.

First, as noted above, the ER discusses the sand dune lizard’s habitat needs and applicable habitat conditions on and near the proposed CISF site. The ER notes that “although the area has some components of sand dune lizard habitat, various factors make it unsuitable.”⁵³ Those factors include a high frequency of mesquite and grassland vegetation associations (which do not support sand dune lizard communities), and a low frequency and extent of shinnery oak dunes and large

⁵⁰ ER, Rev. 2, Sec. 3.5.4 at 3-34.

⁵¹ Motion at 3; Amended Contention at 3.

⁵² *Id.*

⁵³ ER, Rev. 2, Sec. 4.5.8 at 4-37.

blowouts (which provide the habitat and microhabitats necessary for sand dune lizard survival).⁵⁴

Thus, the ER does, in fact, note the potential for suitable habitat conditions in the area, but explains that such areas of habitat are small and isolated from each other, and that field surveys conducted to date have not identified any sand dune lizards on the proposed CISF site.⁵⁵

Second, the ER expressly notes that “[t]he Texas horned lizard has been reported as present on the property controlled by [WCS] by previous surveys.”⁵⁶ Thus, the notation in Table 3.1-1 (“Species of Regulatory Concern”) on page 60 of the 2007 Report indicating that the Texas horned lizard has been “Observed on the Site” is not a new and materially different fact.

In short, the specific facts in the 2007 Report cited by Sierra Club were included the ER. As such, they do not support Sierra Club’s claim of new and materially different information.

4. Sierra Club Has Not Identified Any New and Materially Different Information in the 2008 Report

Sierra Club’s reliance on the 2008 Report, which is an environmental assessment prepared to support the renewal of WCS’s Texas-issued license for the processing and storage of radioactive waste at the WCS Facility, also is unavailing. Sierra Club asserts that the 2008 Report was limited to “a very narrow set of issues regarding the LLRW operation and impacts on the site itself,” and that “[t]here is no indication that any review was made of the area surrounding the site.”⁵⁷ It further claims that the 2008 Report “simply says that the horned lizard is in the area and there is no dunes sagebrush lizard habitat on the site.”⁵⁸

⁵⁴ ER, Rev. 2, Sec. 3.5.6 at 3-35.

⁵⁵ See ER, Rev. 2, Sec. 3.5.4 at 3-34 to 3-35; Sec. 3.5.8 at 3-37 (“Although the CISF does contain sand dune/shinnery oak communities, which could be potential sand dune lizard habitat, field surveys conducted in October 2003 and June 2004 revealed that the sand dune lizards are not present on the CISF.”).

⁵⁶ ER, Rev. 2, Sec. 3.5.4 at 3-34.

⁵⁷ Motion at 3; Amended Contention at 3.

⁵⁸ Motion at 3; Amended Contention at 4.

These assertions, even if viewed as correct (which they are not), do not establish the existence of any new and materially different information relative to that contained in the ER. Section 3.5.16 of the ER notes that the 2008 Report is an environmental assessment that was prepared in 2008 to support the relicensing of the WCS processing and storage facility.⁵⁹ Moreover, it lists the 2008 Report as one of multiple documents containing a “description of the ecological studies” discussed in ER Section 3.5.⁶⁰ Thus, while the 2008 Report is not a survey itself, it reflects certain information obtained from the previous surveys discussed above (*i.e.*, the surveys described in the 1997, 2004, and 2007 Reports). For example, it notes that Andrews County lies within the published range of the Texas horned lizard; that two individuals of that species were observed north of the area surrounding the storage and processing facility in 1996; and that the sand dune lizard’s habitat is primarily confined to active sand dunes, which are in a limited area of Texas and New Mexico and not present at the WCS Facility site.⁶¹ Importantly, these same basic facts are included in the ER—there is nothing new and materially different about them.

* * *

In summary, none of the information purportedly obtained by Sierra Club from the four reports discussed above is new and materially different. Notably, in the case of the first document, the 1997 Report, Sierra Club’s claims that the study did not encompass the current proposed CISF site area and lacked scientific support are themselves groundless. With regard to the three other reports, the information cited by Sierra Club was included in the ER and, therefore, is not new.

⁵⁹ ER, Rev. 2, Sec. 3.5.16 at 3-40.

⁶⁰ *Id.*

⁶¹ *See* 2008 Report at 12.

Accordingly, the Board should deny Sierra Club’s Motion and the admission of Amended Contention 13 for failure to show good cause under 10 C.F.R. § 2.309(c)(1)(i) and (ii).

V. AMENDED CONTENTION 13 IS INADMISSIBLE BECAUSE IT FAILS TO MEET THE CONTENTION ADMISSIBILITY STANDARDS IN 10 C.F.R. § 2.309(f)(1)

Sierra Club’s failure to satisfy the “good cause” test in Section 2.309(c)(1) is, by itself, grounds for Board denial of the Motion and rejection of Amended Contention 13. Regardless, the amended contention is inadmissible because it lacks adequate support and fails to raise a genuine material dispute with the ER, contrary to the requirements of 10 C.F.R. § 2.309(f)(1)(v)-(vi). The Board, accordingly, may deny admission of Amended Contention 13 for these additional reasons.

A. Amended Contention 13 Lacks Factual Support, Contrary to the Requirement of Section 2.309(f)(1)(v)

None of the purportedly “new” information cited by Sierra Club supports its claim that the ER does not adequately describe the affected environment or assess the potential impacts of the proposed CISF on the dune sagebrush lizard and Texas horned lizard. For the reasons explained above, there is no factual basis for Sierra Club’s claim that, because the four reports “were focused on the LLRW site adjacent to the [CISF] site,” they did not include surveys of habitat and species located within the footprint of the CISF site.⁶² On the contrary, the ER figures cited above clearly show that prior surveys included areas within the footprint of the proposed CISF site, which is located directly north, and within one mile of, the existing WCS Facility.⁶³

Sierra Club’s assertions that the four reports are “out of date” and not “scientifically supported” also are factually baseless. The field surveys described in the four reports were conducted by consultants (Ecology Group, Doug Reagan & Associates) with appropriate scientific

⁶² Amended Contention 13 at 4.

⁶³ See Attachments 1-3.

credentials. Notably, Sierra Club itself has pointed to no other “credible” ecological field surveys or published scientific literature that might provide alternative or additional sources of information, and which might support its claim that the Texas horned lizard and sand dune lizard “are or likely are present at the CIS[F] site.”⁶⁴ Thus, it is Sierra Club—not ISP—that relies on unsubstantiated claims and “false” characterizations of the information contained in the reports discussed in the ER.

Sierra Club also objects to the ER’s statement that “[n]o communities or habitats that have been defined as rare or unique or that support threatened and endangered species have been identified on the CISF.”⁶⁵ However, that statement is factually correct, and Sierra Club provides no information or evidence, beyond speculation, to conclude otherwise.⁶⁶ Neither the sand dune lizard nor the Texas horned lizard is a threatened or endangered species under federal law, and only the Texas Horned Lizard is considered threatened under Texas state law.⁶⁷ And, while some dune formations are adjacent to the proposed area of disturbance, surveys conducted in the 2003-2004 timeframe did not detect the presence of the sand dune lizard or Texas horned lizard in the areas of the proposed WCS CISF site.⁶⁸ Finally, the ER explains that potentially suitable habitat for the

⁶⁴ Amended Contention at 3.

⁶⁵ *Id.* at 4 (quoting ER, Rev. 2, Sec. 4.5.8 at 4-36).

⁶⁶ *See* ER, Rev. 2, Sec. 3.5.4 at 3-34 (Table 3.5-1); *see also* Texas Parks and Wildlife, “Federal and State Listed Amphibians and Reptiles in Texas” (listing only Texas horned lizard as threatened under Texas law and not listing dunes sagebrush lizard), *available at* https://tpwd.texas.gov/huntwild/wild/wildlife_diversity/nongame/listed-species/amphibians-reptiles.phtml (last visited Oct. 1, 2019); *see also* U.S. Fish and Wildlife Service (“USFWS”), Environmental Conservation Online System, Species Profile for Dunes Sagebrush Lizard, *available at* <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=C03J> (last visited Oct. 1, 2019) (indicating dunes sagebrush lizard is not threatened or endangered) (“FWS Dunes Sagebrush Lizard Profile”) and USFWS, Environmental Conservation Online System, Species Profile for Texas Horned Lizard, *available at* <https://ecos.fws.gov/ecp0/profile/speciesProfile?sId=7732> (last visited Oct. 1, 2019) (same for Texas horned lizard) (“FWS Texas Horned Lizard Profile”).

⁶⁷ *See* ER, Rev. 2, Sec. 3.5.4 at 3-34.

⁶⁸ *See* ER, Rev. 2, Sec. 4.5.8 at 4-37.

Texas horned lizard is present throughout the broader region and, as such, is not unique to the proposed WCS CISF site.⁶⁹

In summary, because Amended Contention 13 lacks adequate factual support (and, indeed, relies on factually incorrect or unsupported claims), it fails to satisfy 10 C.F.R. § 2.309(f)(1)(v) and, accordingly, should be rejected as inadmissible.

B. Amended Contention 13 Fails to Raise a Genuine Material Dispute with the ER, Contrary to the Requirement of Section 2.309(f)(1)(vi)

Amended Contention 13 also is inadmissible under 10 C.F.R. § 2.309(f)(1)(vi). Sierra Club fails to provide any information indicating that the ER's discussions of the sand dune lizard and the Texas horned lizard are inadequate or do not comply with applicable NRC regulations and guidance. Moreover, the ER's conclusion in Section 4.5.10 that there will be no substantial impacts from the WCS CISF on either species is fully supported by the information in ER Chapters 3 and 4. For the reasons discussed above, Sierra Club has not challenged those ER chapters with the requisite specificity and basis, especially in view of the factual errors in its claims identified above.

The NRC's regulations in 10 C.F.R. § 72.34 require that ISP submit an ER that complies with the requirements of 10 C.F.R. Part 51. Part 51, in turn, requires that the ER contain a baseline description of the environment that would be affected by the proposed construction and operation of the CISF, a description of the impact of the CISF on the environment, and a description of any adverse environmental effects which cannot be avoided.⁷⁰ NUREG-1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs" (July 2003), provides guidance

⁶⁹ See ER, Rev. 2, Sec. 3.5.4 at 3-34.

⁷⁰ 10 C.F.R. § 51.45(b).

to the NRC Staff in reviewing applications for construction of ISFSIs, as well as guidance to applicants on the format and technical content of an ER.⁷¹

As directly pertinent here, NUREG-1748 directs applicants to provide a “[l]ist and description of important species and their spatial and temporal distributions” along with other information.⁷² NUREG-1748 defines the term “important species” as a species “[l]isted as a threatened, endangered, or other species of concern by the State or States in which the proposed facilities are located.”⁷³ NUREG-1748 also states that applicants should evaluate whether any of the proposed activities are expected to impact communities or habitats that have been defined as rare or unique or that support threatened, endangered, or important species.⁷⁴

The ER fully complies with these regulations and guidance. ER Section 3.5 (“Ecological Resources”) contains an extensive description of the terrestrial communities of the proposed CISF area prior to any disturbances associated with construction or operation of the facility. ER Section 3.5.16 identifies the ecological studies of the area described in the 1997, 2004, 2007, and 2008 Reports.⁷⁵ Moreover, the ER includes a fulsome discussion of the actual or potential presence of habitats for, and populations of, important species, including the Texas horned lizard, and other terrestrial species, including the sand dune lizard. Specifically, ER Section 3.5.2 specifically identifies both the sand dune lizard and Texas horned lizard as species that occur within the environmental study area.⁷⁶ ER Section 3.5.4 notes that the “Texas Horned Lizard has been

⁷¹ See generally NUREG-1748 at 6-1 to 6-35.

⁷² *Id.* § 6.3.5 at 6-10, 6-11.

⁷³ *Id.* at 5-10, tbl. 2.

⁷⁴ *Id.* § 6.4.5 at 6-21.

⁷⁵ See ER, Rev. 2, Sec. 3.5.16 at 3-40.

⁷⁶ See ER, Rev. 2, Sec. 3.5.2 at 3-29 to 3-30.

reported as present on the property controlled by [WCS] by previous surveys . . . and it is likely that the species is widespread in the region, as reported by previous investigators.”⁷⁷

Similarly, ER Section 3.5.3.2 states that the sand dune lizard is potentially present in the area, but Section 3.5.4 notes that the nearest location at which a juvenile sand dune lizard was found was 2.5 miles southeast of the WCS CISF site.⁷⁸ Section 3.5.6 concludes that the WCS CISF site does not support sand dune lizard habitat.⁷⁹ In addition, Attachment 3-3 to the ER contains a letter from the USFWS dated April 14, 2015 listing five threatened or endangered species as present or potentially present at the WCS CISF site.⁸⁰ Importantly, the USFWS Letter did not list either the Texas horned lizard or the sand dune lizard as threatened or endangered under federal law, and did not identify any critical habitat concerns for any federally-listed species within the WCS CISF site⁸¹—all of which is consistent with the ER and the four reports discussed above.

ER Section 4.5 (“Ecological Resource Impacts”) discusses the potential impacts from the construction and operation of the WCS CISF on these species. As explained in ER Section 4.5.8, no communities or habitats defined as rare or unique or that support threatened and endangered species have been identified in the proposed area of the WCS CISF.⁸² Nevertheless, ER Section 4.5.8 indicates that the Texas horned lizard may be impacted by CISF construction and operation

⁷⁷ ER, Rev. 2, Sec. 3.5.4 at 3-34.

⁷⁸ ER, Rev. 2, Sec. 3.5.4 at 3-34 to 3-35.

⁷⁹ ER, Rev. 2, Sec. 3.5.6 at 3-35.

⁸⁰ See ER, Rev. 2, attach. 3-3, Letter from USFWS, “List of threatened and endangered species that may occur in your proposed project location and/or may be affected by your proposed project” at 3 (Apr. 14, 2015) (“USFWS Letter”). Subsequent to the date of the USFWS Letter, the USFWS delisted one of the species identified in the letter, the Lesser Prairie Chicken. Final Rule, Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken Removed from the List of Endangered and Threatened Wildlife, 81 Fed. Reg. 47,047 (July 20, 2016).

⁸¹ See USFWS Letter.

⁸² ER, Rev. 2, Sec. 4.5.8 at 4-36.

because “the species has adapted to areas of human activities such as overgrazed pastures, plowed fields, and fencerows” and thereby may be present, currently or in the future, at the WCS CISF.⁸³

As noted above, although ER Section 4.5.8 identifies the presence of dune formations adjacent to the proposed area of disturbance with the potential to provide habitat for the sand dune lizard, it notes that no population of that species has been identified at the site. Based on the referenced ecological survey reports, ER Section 4.5.8 states that the closest sand dune lizard population was three miles north of the neighboring National Enrichment Facility site.⁸⁴ Those reports also stated that there are several thousand acres of sand dune formations suitable for sand dune lizard populations nearby that would not be impacted by the project.⁸⁵ For both species, ER Section 4.5.4 concludes that “the ecological impacts of this land disturbance are expected to be small given the CISF area size, *especially in relation to the vast amount of uninhabited and undisturbed land* found throughout the region.”⁸⁶

In summary, Amended Contention 13, like its precursor, provides no alleged facts or expert opinions to support the claim that “the ER is inadequate in describing the affected environment.”⁸⁷ Although Amended Contention 13 references various sections in ER Chapters 3 and 4, it ultimately relies on factually erroneous assertions, and fails to show that the ER does not comply with NEPA or NRC regulations. Thus, Amended Contention 13 fails to raise a genuine material dispute with the ER, and should be rejected as contrary to 10 C.F.R. § 2.309(f)(1)(vi).

⁸³ ER, Rev. 2, Sec. 4.5.8 at 4-37.

⁸⁴ *Id.* The National Enrichment Facility is 1 mile southwest of the WCS CISF site. ER, Rev. 2, Sec. 2.2.1 at 2-3.

⁸⁵ ER, Rev. 2, Sec. 4.5.8 at 4-37.

⁸⁶ ER, Rev. 2, Sec. 4.5.4 at 4-35 (emphasis added). Contrary to Sierra Club’s claims in Amended Contention 13, the ER does not conclude that there will be “no impact” on either species. Rather, ER Section 4.5.10 concludes that the impact on the Texas horned lizard, which is “highly adaptable,” will be small. Nothing identified by Sierra Club in proposed Amended Contention 13 challenges that conclusion.

⁸⁷ Amended Contention 13 at 1.

VI. CONCLUSION

For the foregoing reasons, the Board should reject Amended Contention 13 as untimely under 10 C.F.R. § 2.309(c)(1) and inadmissible under 10 C.F.R. § 2.309(f)(1). If the Board grants ISP's pending Motion to Dismiss Contention 13 and denies the admission of Amended Contention 13, then it should terminate this proceeding, because there no longer would be any contested matters pending before the Board.

Respectfully submitted,

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Dated in Washington, D.C.
this 1st day of October 2019

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)

INTERIM STORAGE PARTNERS LLC)

(Consolidated Interim Storage Facility))

) Docket No. 72-1050

) October 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of “Interim Storage Partners LLC’s Answer Opposing Sierra Club’s Motion to Amend Contention 13” was filed through the E-Filing system.

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