

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

IN THE MATTER OF:) Docket No. 72-1050
)
INTERIM STORAGE PARTNERS LLC) ASLB No. 19-959-01-ISFSI-BD01
)
(Consolidated Interim Storage Facility)) October 7, 2019

**SIERRA CLUB’S REPLY TO ISP’S ANSWER TO SIERRA CLUB’S MOTION TO
AMEND CONTENTION 13**

INTRODUCTION

The thrust of Sierra Club Amended Contention 13, just as with the original Contention 13, is that the conclusion in the ER submitted by ISP that there would be no impact on the Texas horned lizard and the dunes sagebrush lizard is not supported by reliable evidence. The sources which the ASLB determined should be made available to the public bolster this contention.

Although the ER makes the unsupported statements that the two species and their habitats are present at the CIS site, the sources were not available in order to determine if there was actually any basis for the claim in the ER that the CIS project would have no adverse impact on the species. That is the reason the ASLB determined that the sources must be available for public scrutiny.

Now that the sources are available, it is apparent that they do not provide support for the conclusion in the ER that the CIS project will have no impact on the Texas horned lizard and the dunes sagebrush lizard. This is information supporting Sierra Club’s contention that was not available before the sources were provided to Sierra Club.

With respect to the three criteria for allowing a late-filed contention set forth in 10 C.F.R. § 2.309(c)(i)-(iii), there is no question that the information on which the amended contention is based was not previously available and that Sierra Club has filed its amended contention in a timely fashion. The only issue is whether the information on which the amended contention is based is materially different from information previously available. As noted above, the material in the sources now revealed substantiate with information not previously available, that there is no basis for the conclusion in the ER that the CIS project will have no adverse impact on the two lizard species.

THE FOUR SOURCES RELIED ON BY ISP PRESENT NEW INFORMATION
MATERIALLY DIFFERENT THAN INFORMATION PREVIOUSLY AVAILABLE

A. The 1997 Report

The 1997 ecological assessment, at p. 4, states that extensive surveys, including specimen collections, were done for plants, birds, mammals, and insects, but only casual observations were made for reptiles and no specimens were collected. As described on page 7 et seq. of the 1997 report, the five study sites referred to on page 9 of ISP's Answer were for the study of plants, not reptiles. There is no indication in the 1997 report that the five sites were used to study reptiles. According to pages 103 and 105-106 of the report, insects and small mammals were collected at the five sites, but there is no reference to reptiles.

This review of the 1997 report demonstrates that none of the statements in the ER were credibly based on that report. In sections 3.5 and 4.5 of the ER there is no reference to the 1997 report. So now having the 1997 report to review, it is established that the

Texas horned lizard and the dunes sagebrush lizard were likely in the area of the proposed CIS site and that there was no basis established from this report that there would be no impact to the species from the CIS project.

B. The 2004 Species Survey

The 2004 report states on page 4 that it is based on a one-day field survey conducted from 7:00 a.m. to 5:30 p.m. There is very little narrative regarding the presence of and impact to the Texas horned lizard and the dunes sagebrush lizard. The report does confirm, however, that the two species are or are likely in the area.

The report concludes as follows:

Development and operation of the proposed low level radioactive waste facility at the site will potentially result in the loss of some individual horned lizards and an incrementally small area of potential habitat. As suitable habitat for the sand dune lizard does not occur on or within 1.5km of the proposed areas of site disturbance, no impacts are anticipated. Protection of the area immediately surrounding the site may result in improved habitat quality for both species over time.

So, rather than support the claim in the ER that the CIS project will have no impact on the species, the 2004 report actually says that the area around the existing LLRW site, which would include the CIS site, should be protected to improve the habitat for the species.

The ER, 3.5.6, refers to an October 2003 survey allegedly showing that the CIS site does not support habitat for the dunes sagebrush lizard. At first blush, one would assume that the October 2003 survey must be referred to in the 2004 report. But, as noted above, the survey on which the 2004 report is based occurred in October of 2004, not 2003. It appears that the reference to an October 2003 survey may be taken from another document that was produced by ISP in response to the ASLB Ruling, a report on the status and habitat of the dunes sagebrush lizard in Lea County, New Mexico, prepared for

the National Enrichment Facility project (Accession No. ML040850611). That report was focused on a site in New Mexico, not the ISP CIS site in Texas. So the ER, 3.5.6, was incorrect in claiming that an October 2003 survey showed that the ISP site does not contain habitat for the dunes sagebrush lizard. Any reference to the New Mexico survey is completely irrelevant to the ISP facility.

The October 2003 New Mexico survey is also referenced in section 3.5.8 of the ER. That section also references a June 2004 survey. That June 2004 survey obviously comes from somewhere other than the 2004 report. It apparently comes from another document submitted by ISP in response to the ASLB Ruling, a report on the habitat and geographic range of the dunes sagebrush lizard in Lea County, New Mexico (Accession No. ML042170040). Just like the 2003 New Mexico report, this report does not cover the area of the ISP project in Texas.

C. The 2007 Report

The 2007 report is also focused on the LLRW site, not the CIS site. In § 2.2, the report says habitat for the dunes sagebrush lizard does not occur on the LLRW site, but does occur north of that site. That location, of course, could include the CIS site. Section 4.0 of the 2007 report says that the LLRW project would have an impact on the Texas horned lizard and even cause the loss of some individual lizards. Of course, that says nothing about the impact of the CIS project on the horned lizard, but since the habitat for the horned lizard exists throughout the area, one can assume the same impacts from the CIS project.

In ISP's Answer at pages 12-13 ISP refers to statements in the ER, but it is not clear that those references are taken from the 2007 report. ISP first refers to section 4.5.8 of the ER (Answer, p. 12), but there is nothing in that section of the ER that refers to the 2007 report. ISP's Answer at p. 13 refers to sections 3.5.4 and 3.5.6 of the ER, but again, there is no reference to the 2007 report. So the discussion of the 2007 report in ISP's Answer is essentially irrelevant to the materiality of the information in the 2007 report.

D. The 2008 Report

Just like the previous reports purportedly relied upon in the ER, the 2008 report is limited to the LLRW site. Moreover, it simply reiterates what was in the previous reports. ISP admits as much in its Answer at page 14. So, the 2008 report does not support the assertion in the ER that the CIS project will have no impact on the Texas horned lizard and the dunes sagebrush lizard.

THE NEW INFORMATION IN THE REPORTS SUBMITTED BY ISP DO NOT
SUBSTANTIATE THE CONCLUSION IN THE ER THAT THE CIS PROJECT WILL
HAVE NO IMPACT ON THE TEXAS HORNED LIZARD AND THE DUNES
SAGEBRUSH LIZARD

The point of Sierra Club Amended Contention 13, just as in the original contention, is that the statements in the ER about the presence of the Texas horned lizard and the dunes sagebrush lizard and their habitats do not support the claim in the ER that the CIS project will have no impact on the two species. The new information now provided by ISP is materially different in that it provides the actual information on which ISP claims to have relied in preparing the ER. As described above, the sources were all focused on the LLRW site, not the CIS site, and to the extent that they discuss the area of the CIS project, they say that the species could be present there and that the area should

be protected. None of that information appears in the ER and it has only been made available in the new information provided by ISP in response to the ASLB ruling.

The NRC's Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, NUREG-1748, states, "The ER should present a detailed and thorough description of each affected resource for evaluation of potential impacts to the environment." It is axiomatic that the discussion of the impacts of a proposed project must be thorough and accurate, since that is the purpose of an environmental report.

Likewise, Council of Environmental Quality regulation, 40 C.F.R. § 1502.16, states:

This section [Environmental Consequences] forms the scientific and analytic basis for the comparisons [of alternatives]. . . . The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.

The requirement for a thorough and accurate discussion of environmental impacts has been upheld by the courts. See, *WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920 (9th Cir. 2015); *Oregon Nat. Res. Council Fund v. Goodman*, 505 F.3d 884 (9th Cir. 2007).

Therefore, the ER in this case violates NEPA and NRC guidance in making the claim that the CIS project will have no adverse impact on the Texas horned lizard and the dunes sagebrush lizard. In fact, the sources on which ISP purports to rely do not support that assertion, and in fact, appear to contradict it. That is exactly why the ASLB held that

the ER was deficient in not providing access to the sources of information on which the ER claimed to rely.

SIERRA CLUB AMENDED CONTENTION 13 IS ADMISSIBLE

A. Standards for Admissibility of Contentions

Pursuant to 10 C.F.R. § 2.309(f), a petitioner’s contentions must: (1) provide a specific statement of the issue of law or fact to be raised or controverted; (2) provide a brief explanation of the basis for the contention; (3) demonstrate that the issue raised in the contention is within the scope of the proceeding; (4) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding; (5) provide a concise statement of the alleged facts or expert opinions which support the petitioner’s position on the issue and on which the petitioner intends to rely at hearing, together with reference to specific sources and documents on which the petitioner intends to rely; (6) provide sufficient information to show that a genuine dispute exists with the licensee on a material issue of law or fact.

The NRC has made clear that the burden on a petitioner in stating its contentions is not heavy. In Dominion Nuclear Conn., Inc. (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, the NRC described the contention admissibility standards as “insist[ing] upon some ‘reasonably specific factual and legal basis’ for the contention.” Id., 54 349,359. The NRC further explained in Millstone that the standards for contention admissibility were meant to prevent contentions based on “little more than speculation” and intervenors who had “negligible knowledge of nuclear power issues and, in fact, no

direct case to present.” *Id.* at 358. Rather, petitioners are required only to ‘articulate at the outset the specific issues they wish to litigate.’” *Id.* at 359.

The NRC and the courts have also made clear that the burden of persuasion is on the licensee, not the petitioner. The petitioner only needs to “com[e] forward with factual issues, not merely conclusory statements and vague allegations.” Northeast Nuclear Energy Company, 53 NRC 22, 27 (2001). The NRC described the threshold burden in stating a contention as requiring a petitioner to “raise any specific, germane, substantial, and material factual issues that are relevant to the . . . request for a license . . . and that create a basis for calling on the [licensee] to satisfy the ultimate burden of proof.” *Id.*

Also, in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 554 (1978), the United States Supreme Court affirmed the NRC in finding that the proper standard to apply required intervenors to simply make a “showing sufficient to require reasonable minds to inquire further,” a burden the NRC found to be significantly less than that of making a prima facie case.

The ASLB in the Yucca Mountain case observed:

The Commission therefore amended its rules to require that contentions have “at least some minimal factual and legal foundation in support.” That is all. That is what DOE agreed at oral argument is the standard. As the Commission emphasized in *Oconee*, the contention requirements were never intended to be turned into a “fortress to deny intervention.”

B. Amended Contention 13 Has Factual Support

ISP claims that the statement in the ER that “[n]o communities or habitats that have been defined as rare or unique or that support threatened and endangered species have been identified in the CISF” is factually correct. On the contrary, the 2004 Report

states that the development of the LLRW site would cause the loss of some Texas horned lizards, a state threatened species, and its habitat, and that similar habitat exists on the site of the proposed CIS facility. The 2007 Report makes a similar statement about the Texas horned lizard and also states that habitat for the dunes sagebrush lizard exists north of the LLRW site, exactly where the CIS facility would be located. The dunes sagebrush lizard is a rare species, and is in fact, according to the 2007 Report, a candidate for listing as a federal endangered or threatened species.

ISP also claims that Amended Contention 13 is incorrect in stating that the statements in the ER concerning the two lizard species are not supported by scientifically valid surveys. While the surveys for plants and animals, other than reptiles, appear to be conducted over an extended period of time and with thorough study, there were only casual observations of reptiles, with no effort to capture any. ISP attempts to shift the burden of presenting valid information to Sierra Club, rather than accepting the requirement under NEPA and NRC guidance that the ER must present “accurate scientific analysis.” 40 C.F.R. § 1500.1(b).

It is significant that ISP does not seriously challenge Sierra Club’s statement that the reports on which the ER relied are out of date. There is no question that the reports are 11-22 years old. ISP improperly expects Sierra Club to carry the burden of presenting current information, but itself presents information that does not provide the thorough and accurate information required.

C. Amended Contention 13 Raises a Genuine Material Dispute with the ER

As explained above and in Amended Contention 13, the contention raises a genuine material dispute with the ER. First, the contention shows that the reports on which the ER relies do not support what the ER states about the lizard species and their habitats. Second, the contention shows that the claim in the ER that the CIS project will have no impact on the species is not supported by the sources on which the ER purports to rely.

Sierra Club has certainly satisfied the standard for admissibility in this regard.

CONCLUSION

Sierra Club Amended Contention 13 satisfies all the requirements for admissibility and should be admitted.

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ATTORNEY FOR SIERRA CLUB

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NUCLEAR REGULATORY COMMISSION
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CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I certify that, on this date, copies of Sierra Club's Reply to ISP's Answer to Sierra Club's Motion to Amend Contention 13 were served upon the Electronic Information Exchange (the NRC's E-Filing System) in the above captioned proceeding.

/s/ *Wallace L. Taylor*

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