

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050

NRC STAFF'S ANSWER IN OPPOSITION TO THE APPEAL OF FASKEN LAND
AND MINERALS, LTD. AND THE PERMIAN BASIN LAND AND ROYALTY OWNERS OF
LBP-19-7

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Permian Basin Land and Royalty Owners of LBP-19-7

Introduction

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission (NRC) Staff files this answer in opposition to the appeal filed by Fasken Land and Minerals, Ltd. and Permian Basin Land and Royalty Owners (together, Fasken)¹ of the Atomic Safety and Licensing Board Memorandum and Order LBP-19-7. In LBP-19-7, the Board found that Fasken had demonstrated standing to intervene but had not submitted an admissible contention in this matter.² Because Fasken has not shown that the Board committed an error of law or abused its discretion, the Commission should affirm the Board's decision.

Background

In April 2016, Waste Control Specialists, LLC (WCS) tendered an application for a specific license under 10 C.F.R. Part 72, requesting authorization to construct and operate a consolidated interim storage facility (CISF) for spent nuclear fuel and reactor-related Greater-

¹ *Fasken and PBLRO's Brief on Appeal of LBP-19-7* (Sept. 17, 2019) (ADAMS Accession No. ML19260J386) (Fasken Appeal).

² *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC ____ (Aug. 23, 2019) (slip op.).

than-Class-C waste in Andrews County, Texas.³ About a year later, WCS requested that the NRC temporarily suspend all review activities associated with its application, and the next day WCS and the NRC Staff jointly requested that the then pending hearing opportunity be withdrawn.⁴

By letters dated June 8 and July 19, 2018, WCS requested that the NRC resume the review of its application, and it provided a revised application, reflecting, among other changes, a new applicant, Interim Storage Partners (ISP), a joint venture between WCS and Orano CIS, LLC.⁵ Thereafter, a notice of opportunity to request a hearing and petition for leave to intervene for the ISP application was published in the *Federal Register*.⁶

On September 28, 2018, Fasken filed a motion to dismiss the ISP application.⁷ The Commission denied the motion and referred it to the Atomic Safety and Licensing Board Panel

³ Letter from J. Scott Kirk, WCS, to Mark Lombard, NRC, *License Application to Construct and Operate a Consolidated Interim Storage Facility for Spent Nuclear Fuel in Andrews County, Texas*, Docket 72-1050 (Apr. 28, 2016) (ML16132A533).

⁴ *Joint Request to Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests* (Apr. 19, 2017) (ML17109A480) (attaching letter to NRC Document Control Desk from Rod Baltzer, WCS (Apr. 18, 2017)).

⁵ Letter from Jeffery Isakson, ISP, to Document Control Desk, NRC (July 19, 2018) (ML18206A482); Letter from Jeffery Isakson, ISP, to Document Control Desk, 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).

ISP's application materials are available at: <https://www.nrc.gov/waste/spent-fuel-storage/cis/wcs/wcs-app-docs.html>, also available at <https://go.usa.gov/xPJKr>. Unless otherwise specified, all of the NRC Staff's citations are to Revision 2 of the License Application (ML18221A397 (package)), Environmental Report (ER) (ML18221A405 (package)), and Safety Analysis Report (SAR) (ML18221A408 (package)).

⁶ Interim Storage Partner's Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070 (Aug. 29, 2018), corrected, 83 Fed. Reg. 44,680 (Aug. 31, 2018) (noting that the correct deadline to file intervention petitions is October 29, 2018), 83 Fed. Reg. 45,288 (Sept. 6, 2018) (correcting the title of the August 31, 2018 correction).

⁷ *Motion of Fasken Land and Minerals and Permian Basin Land and Royalty Owners to Dismiss Licensing Proceedings for HI-Store Consolidated Interim Storage Facility and WCS Consolidated Interim Storage Facility* (Sept. 28, 2018) (ML18271A244). Fasken filed its initial motion to dismiss the ISP and Holtec International proceedings on September 14, 2018 and served it only in the *Holtec* docket. Fasken filed its identical motion to dismiss in this docket on September 28, 2018.

(ASLBP) for consideration under § 2.309.⁸ Fasken thereafter filed a timely petition to intervene and request for a hearing regarding the ISP application.⁹ The Staff and ISP responded to Fasken's petition.¹⁰ The Board held oral argument on standing and contention admissibility on July 10-11, 2019.¹¹

Thereafter, the Board issued its decision, finding that Fasken had demonstrated standing but had not submitted a proposed contention that met the requirements of 10 C.F.R.

§ 2.309(f)(1).¹² Fasken now appeals the Board's decision to the Commission. As discussed below, the NRC Staff opposes Fasken's appeal.

Discussion

I. Applicable Legal Standards

A. Review of Petitions to Intervene Under 10 C.F.R. § 2.311

The NRC's regulations at 10 C.F.R. § 2.311(c) provide an appeal as of right on the question of whether a petition to intervene and/or request for hearing should have been granted. On threshold matters such as standing and contention admissibility, the Commission gives

⁸ Order of the Secretary (Oct. 29, 2018) (unpublished) (ML18302A329).

⁹ *Petition of Permian Basin Land and Royalty Organization and Fasken Land and Minerals for Intervention and Request for Hearing* (Oct. 29, 2018) (ML18302A412) (Fasken Petition). Multiple other petitioners also filed hearing requests and petitions to intervene. *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Oct. 3, 2018) (ML18276A242); *Petition 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, Sustainable Energy and Economic Development Coalition, and Leona Morgan, Individually, to Intervene and Request for an Adjudicatory Hearing* (Nov. 13, 2018) (ML18317A433); *Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club* (Nov. 13, 2018) (ML18317A411).

¹⁰ *NRC Staff's Response to Petitions to Intervene and Requests for Hearing Filed by Permian Basin Land and Royalty Organization and Fasken Land and Minerals* (Nov. 23, 2018) (ML18327A071) (NRC Staff Response); *Interim Storage Partners LLC's Answer Opposing Hearing Request and Petition to Intervene Filed by Permian Basin Land and Royalty Organization and Fasken Land and Minerals* (Nov. 20, 2018) (ML18324A892) (ISP Answer).

¹¹ Transcript of Oral Argument in Interim Storage Partners LLC (July 10, 2019), at 1–207 (ML19198A218) and (July 11, 2019), at 208–342 (ML19198A219).

¹² *ISP, LBP-19-7*, 90 NRC at __ (slip op. at 105–06).

substantial deference to board rulings unless the appeal points to an error of law or abuse of discretion which might serve as grounds for reversal of the board's decision.¹³ The Commission has maintained that "[r]ecitation of an appellant's prior positions in a proceeding or statement of general disagreement with a decision's result is not sufficient."¹⁴ Rather, a valid appeal "must point out the errors in the [b]oard's decision."¹⁵ In addition, the Commission will not entertain an argument that is raised for the first time on appeal.¹⁶

B. Legal Requirements for Contention Admissibility

10 C.F.R. § 2.309(f)(1) establishes the "basic criteria that all contentions must meet in order to be admissible."¹⁷ Pursuant to that section, a contention must:

- (i) provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) provide a brief explanation of the basis for the contention;
- (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and

¹³ *S. Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 220 (2011); *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008).

¹⁴ *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017) (citations omitted).

¹⁵ *Id.*

¹⁶ *See Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 235, 260 (1996) (rejecting an argument raised for the first time on appeal, which did not satisfy the factors for admission of late-filed contentions, on that basis alone).

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

- (vi) provide information sufficient to show that a genuine dispute with the applicant/licensee exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case of an application that is asserted to be deficient, the identification of such deficiencies and supporting reasons for this belief.¹⁸

The Commission has strictly applied these contention admissibility requirements in NRC adjudications.¹⁹ Failure to comply with any one of these criteria is grounds for the dismissal of a contention.²⁰ The requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”²¹ The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing” as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.²² The Commission has emphasized that attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”²³ A contention must be rejected where, rather than raising an issue that is concrete or litigable, it reflects nothing more than a generalization regarding the petitioner’s view of what the applicable policies ought to be.²⁴

The Commission has also emphasized that “contentions shall not be admitted if at the *outset* they are not described with reasonable specificity or are not supported by some alleged

¹⁸ 10 C.F.R. § 2.309(f)(1).

¹⁹ *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *pet. for recons. denied*, CLI-02-1, 55 NRC 1 (2002)).

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

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

²² *Id.*

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

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

fact or facts *demonstrating* a genuine material dispute” with the applicant.²⁵ The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”²⁶ In addition, 10 C.F.R. § 2.335(a) prohibits, absent waiver, a challenge to a Commission rule or regulation in any adjudicatory proceeding subject to 10 C.F.R. Part 2.

II. The Board Did Not Commit a Legal Error or Abuse Its Discretion in Denying Fasken’s Contentions

Fasken asserts that the Board erred in denying Contentions 2, 3, and 4. As explained below, Fasken does not demonstrate that the Board committed an error of law or abused its discretion. The Board correctly held that Fasken’s contentions failed to meet the Commission’s contention admissibility requirements under 10 C.F.R. § 2.309(f)(1). Therefore, the Commission should affirm the Board’s decision.

A. Fasken Contention 2 (Site Stability)

In Contention 2, Fasken asserted that the Safety Analysis Report (SAR) fails to discuss the presence and effect of well bores drilled near the site.²⁷ Fasken asserted that 4,947 wells drilled within ten miles of the site, 905 of which are abandoned, as well as the potential for orphaned wells, may affect site stability and thus requires analysis under 10 C.F.R. § 72.103(a)(1).²⁸

Initially, the Staff did not oppose the admissibility of Contention 2 insofar as it challenged the application’s evaluation of the potential impact of these wells on site stability.²⁹ At oral

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

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

²⁷ Fasken Petition at 15–17.

²⁸ *Id.* at 16 (citing Declaration of Aaron Pachlhofer at 6).

²⁹ NRC Staff Response at 16. Staff opposed the portion of the contention that asserted that the wells should be analyzed as potential pathways to groundwater. *Id.*

argument, however, Staff withdrew its support in light of ISP's response to a Request for Additional Information (RAI), which in the Staff's view, rendered moot the omission.³⁰ ISP consistently opposed admission of the contention.³¹

In LBP-19-7, the Board declined to admit Contention 2 and ruled that Fasken failed to acknowledge or address relevant portions of ISP's application and failed to provide factual or legal support for its claims in accordance with 10 C.F.R. § 2.309(f)(1)(v) and (vi).³² Specifically, the Board pointed to SAR Sections 2.1, 2.6, 2.7, and SAR Attachment D, as relevant portions of the application that were unchallenged by Fasken.³³ The Board found that Fasken had not "identified any plausible impact from oil and gas wells that might affect ISP's proposed facility" as "the proposed site boundary includes but a single dry hole, and all but a handful of the 4,579 well bores Fasken claims are within a 10-mile radius are miles away."³⁴

³⁰ Transcript of Oral Argument in Interim Storage Partners LLC (July 10, 2019), at 198 (ML19198A218). The RAI response was provided to the Board and the litigants on June 3, 2019, and states in relevant part:

"There is no active oilfield activity within the WCS CISF footprint area and only one documented dry hole in the immediate area of the WCS CISF (Figure 2-36). That dry hole has been cemented to the surface and proper plugging and abandonment protocol was observed. There is no evidence of any undocumented or 'orphan' wells in the vicinity of the WCS CISF. If any open boreholes indicative of orphan wells are discovered during the construction process, these will be properly assessed and remediated using proper plugging and abandonment procedures in accordance with Texas Regulations."

Letter from Timothy Matthews, Morgan Lewis, to the Atomic Safety and Licensing Board, "Licensing Board Notification Regarding ISP Letter E-54257" (June 3, 2019), Enclosure 3, "Excerpt from Attachment 3 to ISP Letter E-54257," Response to RAI NP-2.2-2 at 3 (ML19156A041).

³¹ Tr. at 193; ISP Answer at 34–41.

³² *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 98–99).

³³ *Id.*

³⁴ *Id.* at 99.

In its appeal, Fasken asserts that it cited relevant portions of ISP's application, specifically SAR Section 2.1,³⁵ and argues that the SAR sections it did not challenge, like SAR Attachment D, fail to discuss orphaned or abandoned oil and gas wells.³⁶ Fasken takes issue with ISP's statement that, should an orphan well be discovered during the construction of the facility, ISP would take action under Part 72; Fasken asserts that this is "not an option" because a license cannot be issued until ISP properly investigates unstable geological characteristics.³⁷ With respect to the RAI, Fasken asserts that the contention is not moot and that the RAI "skews" 10 C.F.R. § 72.103 requirements by shifting the focus to oil activity within a five-mile radius or the boundaries of the site as opposed to the region.³⁸ Fasken also faults ISP for failing to provide support such as articles or reports for ISP's statement that "there is no evidence of . . . orphan wells in the vicinity of the [site]."³⁹

Fasken does not identify an error of law or abuse of discretion in the Board's decision. Fundamentally, the Board found that Fasken had entirely failed to acknowledge (and thus necessarily failed to show a dispute with) the portions of the application "which evaluate and reach the conclusions required by § 72.103(a)(1)."⁴⁰ The Board likewise observed that in any event, Fasken had failed to demonstrate how the wells described in the contention could affect the geological stability considerations enumerated in the regulation.⁴¹ On appeal, Fasken insists that "[u]ntil these wells are investigated for their integrity, they must be classified as

³⁵ Fasken Appeal at 6.

³⁶ *Id.* at 7.

³⁷ *Id.* at 8, 11.

³⁸ *Id.* at 10.

³⁹ *Id.* at 11 (quoting Response to RAI 2.2-2).

⁴⁰ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 98).

⁴¹ *Id.*

unstable geologic characteristics.”⁴² It also hypothesizes about the potential in the region for orphan wells for which data may not even be publicly available.⁴³ But these assertions ultimately identify no error in the Board’s reasoning: because Fasken failed to specify any requirement to “further enumerate or list wells within any specific radius of the site” and because “all but a handful of the 4,579 well bores Fasken claims are within a 10-mile radius are miles away,”⁴⁴ Fasken failed to identify a plausible and material impact to the site’s stability and thus any genuine dispute with the applicant’s conclusions regarding § 72.103.

In the same vein, even assuming Fasken were correct that the application initially omitted a required discussion on abandoned or orphaned wells, this omission is moot given ISP’s response to RAI 2.2-2. It provides ISP’s explanation that there is only one documented dry hole in the immediate area of the site and no evidence of any undocumented or orphan wells in the vicinity, as well as how open boreholes would in any event be assessed and remediated if discovered during the construction process. And Fasken provides no legal basis for its assertion that 10 C.F.R. § 72.103 requires broader regional investigation for such wells, given that nontectonic surface deformation, such as what could occur from an abandoned or orphaned well, is a localized hazard, as opposed to a regional one.⁴⁵ As Fasken has neither identified an error of law or abuse of discretion in the Board’s decision, the Commission should affirm the Board’s ruling that Contention 2 is inadmissible.

⁴² Fasken Appeal at 5.

⁴³ *Id.* at 5–6.

⁴⁴ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 99) (citing *ISP Answer* at 38); *see also* *ISP Answer* at 38 n.159.

⁴⁵ See 10 C.F.R. § 72.103(f)(1) (“The size of the region to be investigated and the type of data pertinent to the investigations must be determined based on the nature of the region surrounding the proposed site. . . . [E]ach applicant shall investigate all geologic and seismic factors (for example, volcanic activity) *that may affect the design and operation of the proposed ISFSI.*”) (emphasis added).

B. Fasken Contention 3 (Aircraft Risks)

In Contention 3, Fasken asserted that ISP's Emergency Response Plan failed to address how the facility would be protected from aircraft crashes. Fasken cited 10 C.F.R. § 72.122(c) and argued that the Emergency Response Plan did not satisfy those requirements. Similarly, Fasken argued that the Emergency Response Plan did not demonstrate compliance with the guidance set forth in NUREG-1567 Section 2.5.2.⁴⁶ The Board found the proposed contention inadmissible on the basis that Fasken misunderstood the regulatory requirements for emergency response plans, and therefore failed to address, much less dispute, the sections of the application that concern the matters that Fasken raised.⁴⁷

On appeal, Fasken asserts that Section 2.5.2 of NUREG-1567 unambiguously directs applicants to review the potential hazards associated with aircraft crashes for facilities located near airports. In Fasken's view, Section 2.5.2 of NUREG-1567 is not dependent on whether an aircraft crash is a credible event. Fasken claims the Board's failure to consider the applicability of NUREG-1567 Section 2.5.2 was an abuse of discretion.⁴⁸

Fasken's appeal is based on an entirely different argument than what it raised before the Board. Namely, rather than a contention focused on the adequacy of ISP's Emergency Response Plan, Fasken makes a new argument that Section 2.5.2 of NUREG-1567 requires the applicant to provide an analysis of the effects of an aircraft crash on the facility, and to do so regardless of the credibility of such a crash.

⁴⁶ Fasken Petition at 18–26; see also “Standard Review Plan for Spent Fuel Dry Storage Facilities” (Final Report), NUREG-1567, (Mar. 2000) § 2.5.2 “Nearby Industrial, Transportation, and Military Facilities,” at 2-15 (ML003686776) (NUREG-1567).

⁴⁷ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 100).

⁴⁸ Fasken Appeal at 12–15.

First, this is a new issue that Fasken raises for the first time on appeal; as such, it should not be entertained.⁴⁹ As the Board explained, Fasken failed to recognize that § 72.122(c) is a facility design requirement, and ISP's corresponding analysis was therefore not required to be in the Emergency Response Plan, but was instead addressed elsewhere in the application.⁵⁰ Fasken's misunderstanding of the regulation does not allow it to now recast its contention and challenge aspects of the application that it previously overlooked.

Second, Fasken is simply incorrect in its view that Section 2.5.2 of NUREG-1567 calls for an analysis of an aircraft crash regardless of the probability of such a crash. Indeed, in contrast to the assertion in the appeal, Section 2.5.2 specifically calls for the reviewer to ensure that the "methods used by the applicant to quantify offsite hazards are consistent with the guidance in Chapter 15, Accident Analysis, of NUREG-1567."⁵¹ Moreover, the Commission spoke to this issue in *PFS*. There, the Commission concluded that the threshold probability for considering a design-basis event (in that case, as here, an accidental aircraft crash) should be set at one in one million (1×10^{-6}).⁵² Finally, Fasken fails to acknowledge, or dispute, ISP's response to RAI 2.2.1 wherein the applicant assessed the probability of such a crash and determined that it was less than one in a million.⁵³

Since Fasken relies on an entirely new argument on appeal, and neither pointed to an error of law nor an abuse of discretion in the Board's decision on Contention 3, the Board's decision should be affirmed.

⁴⁹ See, e.g., *Yankee Nuclear*, CLI-96-1, 43 NRC at 260.

⁵⁰ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 100-01).

⁵¹ NUREG-1567 § 2.5.2 at 2-15.

⁵² *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 265 (2001).

⁵³ Response to RAI NP-2.2-1 at 1 (ML19156A041).

C. Fasken Contention 4 (Groundwater and Aquifers)

In Contention 4, Fasken argued that the application, “[c]ontrary to the requirements of 10 C.F.R. § 51.45 . . . has failed to adequately evaluate the potential for radiological and other environmental impacts . . . and has also failed to include adverse information regarding the proposed action.”⁵⁴ To support this contention, Fasken pointed to ISP’s SAR as failing “to provide an analysis bounding the potential groundwater contamination from site operations.”⁵⁵

The Board ruled that Contention 4 is inadmissible for several reasons: 1) Fasken failed to provide support for the essential factual premise of its contention that an aircraft crash is a credible event; 2) Fasken did not challenge the application’s assessment that there is no credible pathway for groundwater contamination; and 3) Fasken failed to challenge or even cite the ER in its environmental contention, instead addressing only the applicant’s SAR.⁵⁶

In its appeal, Fasken renews its argument that “an airplane crash is a real possibility and that such an accident could result in a release of radioactive material in both the atmosphere and the subsurface of the Site.”⁵⁷ Fasken also argues that the Board erred because Fasken’s assertions regarding aquifers and water formations at the site represent a genuine issue of fact, irrespective of whether a pathway exists for radiological contamination of groundwater.⁵⁸ Finally, Fasken argues that its failure to challenge the applicant’s ER in its environmental contention is a matter of “form over substance” that “should not preclude Contention 4 from being admitted.”⁵⁹

⁵⁴ Fasken Petition at 26.

⁵⁵ *Id.* at 27.

⁵⁶ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 102–03).

⁵⁷ Fasken Appeal at 15–16.

⁵⁸ *Id.* at 16–19.

⁵⁹ *Id.* at 15.

The Board did not err in its analysis of the independent bases on which it dismissed Contention 4. By failing to take issue with ISP's analysis of credible fire and explosion events in its speculative assertions about the hazards of an aircraft crash, Fasken failed to provide a necessary factual basis for its contention.⁶⁰ Similarly, Fasken failed to provide information on how aircraft crash impacts are reasonably foreseeable impacts that must be considered under the National Environmental Policy Act (NEPA), and not remote and speculative events.⁶¹ Therefore, it follows that Fasken's failure to posit a reasonably foreseeable pathway to groundwater impacts controverting ISP's analyses renders immaterial its other arguments about groundwater characterization. As the Board noted, "[a]bsent a pathway to groundwater contamination, Fasken's claims are not material because their resolution would make no difference in the outcome of the licensing proceeding," as 10 C.F.R. § 2.309(f)(1)(vi) requires.⁶² Finally, the Commission's "strict by design"⁶³ contention admissibility requirements require litigants to raise concrete issues and provide proper notice regarding the nature of their challenges—failure to do so is grounds for dismissal of the contention.⁶⁴ Therefore, the Board properly concluded that Fasken's failure to challenge the ER in its environmental contention is another reason that Contention 4 is inadmissible.⁶⁵

⁶⁰ 10 C.F.R. § 2.309(f)(1)(v).

⁶¹ See *Private Fuel Storage, L.L.C.* (Indep. Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 352 (2002) (a "rule of reason" applies to the analysis requirements of NEPA; NEPA does not require the consideration of "worst-case scenarios" or "remote and highly speculative" events.).

⁶² *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 103).

⁶³ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied*, CLI-02-1, 55 NRC 1 (2002).

⁶⁴ See *Oyster Creek*, CLI-06-24, 64 NRC at 119; Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

⁶⁵ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 103).

Because Fasken does not show that the Board committed an error of law or abused its discretion in finding that Fasken failed to present an admissible contention under 10 C.F.R. § 2.309(f)(1), the Commission should affirm the Board's decision.

Conclusion

For the reasons stated above, the Commission should affirm the Board's order in LBP-19-7.

Respectfully submitted,

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Dated in Rockville, MD
this 15th day of October 2019

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC Staff's Answer in Opposition to the Appeal of Fasken Land and Minerals, Ltd. and the Permian Basin Land and Royalty Owners of LBP-19-7," dated October 15, 2019, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the captioned proceeding, this 15th day of October 2019.

/Signed (electronically) by/

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Dated in Rockville, MD
this 15th day of October 2019