

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

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NRC STAFF'S ANSWER IN OPPOSITION TO INTERIM STORAGE PARTNERS  
LLC'S APPEAL OF LBP-19-7

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NRC Staff's Answer in Opposition to Interim Storage Partners LLC's Appeal of LBP-19-7

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**Introduction**

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission (NRC) Staff (Staff) files this answer in opposition to the appeal filed by Interim Storage Partners LLC<sup>1</sup> of the Atomic Safety and Licensing Board Memorandum and Order LBP-19-7. In LBP-19-7, the Board found that Sierra Club had demonstrated standing to intervene and had submitted an admissible contention in this matter.<sup>2</sup> Because ISP 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-than-Class-C waste in Andrews County, Texas.<sup>3</sup> About a year later, WCS requested that the

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<sup>1</sup> *Brief in Support of Interim Storage Partner LLC's Appeal of LBP-19-7* (Sept. 17, 2019) (ADAMS Accession No. ML19260H452) (ISP Appeal).

<sup>2</sup> *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC \_\_ (Aug. 23, 2019) (slip op.).

<sup>3</sup> 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).

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its application, and the next day WCS and the NRC Staff jointly requested that the then pending hearing opportunity be withdrawn.<sup>4</sup>

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.<sup>5</sup> Shortly 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*.<sup>6</sup>

The Sierra Club filed a timely petition to intervene and request for a hearing regarding the ISP application.<sup>7</sup> Multiple other petitioners also filed hearing requests and petitions to

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<sup>4</sup> *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)).

<sup>5</sup> 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)).

<sup>6</sup> *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).

<sup>7</sup> *Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club* (Nov. 13, 2018) (ML18317A411) (Sierra Club Petition); see also Order of the Secretary (Oct. 25, 2018) (unpublished) (ML18298A335) (extending the deadline to file a hearing request to Nov. 13, 2018).

intervene.<sup>8</sup> The NRC Staff and ISP answered Sierra Club's petition.<sup>9</sup> The Board held oral argument on standing and contention admissibility on July 10-11, 2019.<sup>10</sup>

Thereafter, the Board issued its decision, granting Sierra Club's petition in part and denying the other petitions.<sup>11</sup> The Board held that Sierra Club demonstrated standing and admitted Sierra Club's Contention 13, in part, "solely as a contention of omission" regarding the availability of certain ecological studies referenced in ISP's Environmental Report (ER).<sup>12</sup> ISP now appeals the Board's decision to the Commission. As discussed below, the NRC Staff opposes ISP'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(d)(1) provide an appeal as of right on the question of whether a petition to intervene and/or request for hearing should have been wholly denied. On threshold matters such as standing and contention admissibility, the Commission

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<sup>8</sup> *Beyond Nuclear, Inc.'s Hearing Request and Petition to Intervene* (Oct. 3, 2018) (ML18276A242); *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); *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) (Joint Petition).

<sup>9</sup> *NRC Staff's Consolidated Response To Petitions To Intervene And Requests For Hearing Filed By: Sierra Club; 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* (Dec. 10, 2018) (ML18344A594) (NRC Staff Response); *Interim Storage Partners LLC's Answer Opposing Hearing Request and Petition to Intervene Filed by Sierra Club* (Dec. 10, 2018) (ML18344A684) (ISP Answer).

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

<sup>11</sup> *ISP*, LBP-19-7, 90 NRC \_\_, \_\_ (slip op. at 106).

<sup>12</sup> *Id.* at \_\_ (slip op. at 16–17, 54–56). These studies are referenced at ER § 3.5.16.

gives substantial deference to board rulings unless the appeal points to an error of law or abuse of discretion which might serve as grounds for reversal of the board's decision.<sup>13</sup> 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."<sup>14</sup> Rather, a valid appeal "must point out the errors in the [b]oard's decision."<sup>15</sup> In addition, an argument made before the board but not reiterated or explained on appeal is considered abandoned.<sup>16</sup>

## **B. Legal Requirements for Standing**

### **1. Traditional Standing Principles**

In addition to fulfilling the general standing requirements of 10 C.F.R. § 2.309(d)(1), a petitioner "must demonstrate that it has an interest that may be affected by the proceeding."<sup>17</sup> The Commission applies contemporaneous judicial concepts of standing to evaluate whether the petitioner has demonstrated the requisite interest.<sup>18</sup> To this end, "a petitioner must (1) allege an injury in fact that is (2) fairly traceable to the challenged action and (3) is likely to be redressed by a favorable decision."<sup>19</sup> The injury claimed by the petitioner must be actual or

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<sup>13</sup> *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).

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

<sup>15</sup> *Id.*

<sup>16</sup> *Int'l Uranium Corp.* (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247, 253 (2001); see *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245 (2010).

<sup>17</sup> See *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 3 and 4), CLI-15-25, 82 NRC 389, 394 (2015).

<sup>18</sup> See *id.* at 394; see also *Calvert Cliffs 3 Nuclear Project, LLC* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009).

<sup>19</sup> *Turkey Point*, CLI-15-25, 82 NRC at 394; *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71–72 (1994); see *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).



threatened and both “concrete and particularized.”<sup>20</sup> The causation element of standing requires a petitioner to show “that the injury is fairly traceable to the proposed action.”<sup>21</sup> The redressability element of standing “requires the intervenor to show that its actual or threatened injuries can be cured by some action of the tribunal.”<sup>22</sup>

## 2. “Proximity-Plus” Standing

In cases involving reactor facilities, the Commission will apply a standing presumption based on proximity to the site.<sup>23</sup> No such automatic presumption exists for nuclear materials proceedings.<sup>24</sup> In such cases, to obtain standing based on geographic proximity to a facility, a petitioner must demonstrate that “the proposed action involves a significant source of radioactivity producing an obvious potential for offsite consequences.”<sup>25</sup> This “proximity-plus” standard is applied on a “case-by-case basis, taking into account the nature of the proposed action and the significance of the radioactive source.”<sup>26</sup> If “there is no ‘obvious’ potential for radiological harm at a particular distance frequented by the petitioner, it becomes the petitioner’s burden to show a specific and plausible means of how the challenged action may harm him or her.”<sup>27</sup> “[C]onclusory allegations about potential radiological harm” are insufficient for this

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<sup>20</sup> *Int'l Uranium*, CLI-01-21, 54 NRC at 250; see also *Sequoyah Fuels*, CLI-94-12, 40 NRC at 71 (stating that “standing has been denied when the threat of injury is too speculative”).

<sup>21</sup> *Sequoyah Fuels*, CLI-94-12, 40 NRC at 75.

<sup>22</sup> *Sequoyah Fuels Corp. (Gore, Oklahoma Site)*, CLI-01-2, 53 NRC 9, 15 (2001).

<sup>23</sup> See *Fla. Power and Light Co. (St. Lucie, Units 1 and 2)*, CLI-89-21, 30 NRC 325, 329 (1989).

<sup>24</sup> See *Nuclear Fuel Servs., Inc. (Erwin, Tenn.)*, CLI-04-13, 59 NRC 244, 248 (2004).

<sup>25</sup> *Ga. Inst. of Tech. (Ga. Tech Research Reactor, Atlanta, Ga.)*, CLI-95-12, 42 NRC 111, 116 (1995).

<sup>26</sup> *Id.* at 116–17.

<sup>27</sup> *USEC, Inc. (American Centrifuge Plant)*, CLI-05-11, 61 NRC 309, 311–12 (2005) (quoting *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248 (internal quotations omitted)).

showing.<sup>28</sup> Where a petitioner is unable to demonstrate “proximity-plus” standing to intervene, traditional standing principles will apply.<sup>29</sup>

On appeal, the Commission gives “substantial deference” to the board’s findings on standing, absent an error of law or abuse of discretion.<sup>30</sup> Unless the board’s “conclusion [on standing] is irrational,” the Commission will not disturb a board’s decision.<sup>31</sup>

### **C. Standards 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.”<sup>32</sup> The Commission has strictly applied these contention admissibility requirements in NRC adjudications.<sup>33</sup> Failure to comply with any one of these criteria is grounds for the dismissal of a contention.<sup>34</sup>

10 C.F.R. § 2.309(f)(2) states that “[o]n issues arising under the National Environmental Policy Act, participants shall file contentions based on the applicant’s environmental report.”

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<sup>28</sup> *Nuclear Fuel Servs.*, CLI-04-13, 59 NRC at 248.

<sup>29</sup> *See U.S. Army Installation Command* (Schofield Barracks, Oahu, Haw., and Pohakuloa Training Area, Island of Hawaii, Haw.), CLI-10-20, 72 NRC 185, 189 (2010).

<sup>30</sup> *Strata Energy, Inc.* (Ross In Situ Uranium Recovery Project), CLI-12-12, 75 NRC 603, 608 (2012) (*Ross ISR*) (citations and internal quotation marks omitted).

<sup>31</sup> *Turkey Point*, CLI-15-25, 82 NRC at 394 n.32 (citations and internal quotations omitted).

<sup>32</sup> *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”).

<sup>33</sup> *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)).

<sup>34</sup> *Private Fuel Storage, LLC* (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).

Because NRC regulations require an ER to inform the Staff's subsequent environmental analysis, the ER stands in for the EIS at the initial contention phase.<sup>35</sup> Although the ultimate burden regarding NEPA lies with the Staff, petitioners must file contentions based on issues raised in the ER to satisfy the regulations and to preserve their hearing rights for when the agency issues its EIS.<sup>36</sup>

The Commission also will not allow an argument first made in a reply brief to provide the support required for an admissible contention.<sup>37</sup> "Replies must focus narrowly on the legal or factual arguments first presented in the original petition or raised in answers to it."<sup>38</sup> And a petitioner cannot provide support to remedy a deficient contention by introducing documents in the reply that were available when the contention was originally filed. Finally, "[a]llowing new claims in a reply not only would defeat the contention-filing deadline, but would unfairly deprive other participants of an opportunity to rebut the new claims."<sup>39</sup>

## II. The Board's Standing Decision Was Correct

The Commission should affirm the Board's finding that Sierra Club demonstrated standing. Under the Atomic Energy Act the Commission, upon request, "shall grant a hearing" of any person whose "interest may be affected."<sup>40</sup> The Commission affords the Board significant

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<sup>35</sup> See *Curators of Univ. of Mo.* (TRUMP-S Project), CLI-95-8, 41 NRC 386, 396 (1995) (discussing that the purpose of an ER is to inform the staff's environmental review, as required under 10 C.F.R. § 51.45(c)).

<sup>36</sup> Final Rule, Rules of Practice for Domestic Proceedings — Procedural Changes in the Hearing process, 54 Fed. Reg. 33,168, 33,172 (Aug. 11, 1989) ("The rule makes clear that to the extent an environmental issue is raised in the applicant's ER, an intervenor must file contentions on that document.") Subsequently, new or amended NEPA contentions may be filed if significantly different data or conclusions are found in the NRC draft or final EIS, environmental assessment, or any supplements relating thereto, from that in the ER. See 10 C.F.R. § 2.309(f)(2).

<sup>37</sup> See *La. Energy Servs., L.P.* (Nat'l Enrichment Facility), CLI-04-35, 60 NRC 619, 623 (2004) (stating that the Commission does "not allow . . . using reply briefs to provide, for the first time, the necessary threshold support for contentions").

<sup>38</sup> *Nuclear Mgmt. Co.* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

<sup>39</sup> *Id.*

<sup>40</sup> 42 U.S.C. § 2239(a)(1)(A).

discretion regarding standing and will not disturb the Board's decision unless its "conclusion is irrational."<sup>41</sup> In the instant case, the Commission should defer to the Board's finding.

ISP disputes Sierra Club's standing by claiming that Sierra Club had not demonstrated an obvious potential for off-site consequences.<sup>42</sup> ISP accordingly asserts that Sierra Club did not demonstrate that radiological releases could affect anyone beyond the facility fence line, let alone six miles away, because "there are no mechanisms available" for the release of "significant quantities" of radioactive materials.<sup>43</sup>

The Board held that Sierra Club had demonstrated standing because one member's residence about six miles from the proposed facility was "well within the limits" the Commission had found sufficient in challenges to actions involving analogous and "much smaller facilities" and because Sierra Club had a sufficient interest in challenging a "potentially massive facility" for "much of the nation's spent nuclear fuel."<sup>44</sup> The Board found that granting Sierra Club standing for such a potentially large storage facility would be consistent with the Commission's direction to "construe standing in favor of the petitioner."<sup>45</sup> The Board also observed that if ISP's position were adopted, no one would have standing "beyond the fence line" of the spent fuel storage site.<sup>46</sup>

On appeal, ISP advances several theories as to how the Board erred. ISP argues that the Board incorrectly applied the proximity presumption by comparisons to other spent fuel

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<sup>41</sup> *Turkey Point*, CLI-15-25, 82 NRC at 394 n.32 (2015).

<sup>42</sup> ISP Answer at 14.

<sup>43</sup> *Id.* at 7-10.

<sup>44</sup> *ISP*, LBP-19-7, 90 NRC \_\_ (slip op. at 16-17) See also *id.* at \_\_ (slip op. 15 n. 83) (citing proceedings in which the NRC found standing for petitioners contesting similar spent fuel facilities ranging from 10-17 miles away.)

<sup>45</sup> *Id.* at \_\_ (slip op. at 16) (finding standing for Beyond Nuclear whose member lived seven miles away.)

<sup>46</sup> *Id.*

facilities;<sup>47</sup> that it erred in determining that quantity alone is enough to establish an obvious potential for offsite radiological consequences;<sup>48</sup> and that the Board could not have found an obvious potential for radiological consequences here because none was specifically pled.<sup>49</sup>

None of these theories warrants disturbing the Board's decision. As the Board found, the NRC has granted standing to intervenors challenging similar spent fuel storage facilities that have been located as far as seventeen miles away.<sup>50</sup> While ISP correctly states that an away-from-reactor storage facility such as the proposed ISP CISF is not identical to the spent fuel facilities in the cases the Board cited, the Board acknowledged the different context and, addressing the specific circumstances of this proceeding, found narrowly that six miles was sufficient in this CISF proceeding potentially involving "much of the nation's spent nuclear fuel."<sup>51</sup> Such a determination, based on case-specific consideration, remains consistent with prior NRC and court decisions finding standing in materials cases based upon proximity to the storage of a large amount of radioactive materials containing a significant source of

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<sup>47</sup> ISP Appeal at 12.

<sup>48</sup> *Id.* at 9.

<sup>49</sup> *Id.* at 10–12.

<sup>50</sup> See, e.g., *Pac. Gas & Elec. Co.* (Diablo Canyon Indep. Spent Fuel Storage Installation), LBP- 02-23, 56 NRC 413, 429 (2002) (Diablo Canyon ISFSI) (ruling 17 miles sufficient and citing other NRC approvals of standing for petitioners within 10 miles of proposed spent fuel facility expansions); *Ne. Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 28 (2000) (finding standing of individual with part-time residence located 10 miles from spent fuel facility); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), LBP-99-25, 50 NRC 25, 29–31 (1999) (finding standing of petitioner 17 miles from spent fuel facility); *Fla. Power & Light Co.* (St. Lucie Nuclear Power Plant, Unit 1), LBP-88-10A, 27 NRC 452, 454–55, *aff'd*, ALAB-893, 27 NRC 627(1988) (granting standing of individual living within 10 miles of spent fuel facility).

<sup>51</sup> *ISP*, LBP-19-7, 90 NRC at \_\_ (slip op. at 16).

radioactivity.<sup>52</sup> Thus, ISP's claim that the Board's decision is based on "quantity alone"<sup>53</sup> is inaccurate.

In asserting that the Board failed to ground its determination on a "plausible mechanism" through which the materials could cause offsite harm,<sup>54</sup> ISP's comparison to the *Schofield Barracks* case is likewise unavailing. There, the Commission determined that there was no obvious potential of radiological consequences 19 miles from a small quantity of low radioactivity depleted uranium (DU) left over from "spotting" ammunition previously used on an army gun range.<sup>55</sup> The Commission explained that there was no obvious potential because radioactivity from this small amount of DU was "significantly low" and there were "no apparent means for the DU to spread beyond its current location."<sup>56</sup> ISP plans to store at least 5,000 metric tons of spent nuclear fuel at the proposed CISF. Given the distinction in both the nature and volume of the material (spent fuel) to be stored, the Board's determination that the present application was analogous to spent fuel storage cases where the NRC had found "proximity-plus" standing at distances almost three times as far as the six miles relied on by Sierra Club was not in error.

ISP further argued that the Commission should use the lack of emergency planning requirements for CISFs as support for the idea that proximity to the proposed ISP CISF is

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<sup>52</sup> See, e.g., *Ga. Tech Research Reactor*, CLI-95-12, 42 NRC at 116-17 (standing found for intervenor living 17 miles from two nuclear facilities seeking to add millions of curies of highly combustible radioactive gas to their reactors); *Shearon Harris*, LBP-99-25, 50 NRC 25 (citing cases and finding 17-mile proximity sufficient for standing in which applicant sought large expansion of spent fuel pools); accord *Nuclear Energy Inst., Inc. v. Env'tl. Prot. Agency*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) (finding standing "self-evident" in a challenge of EPA's radiation standards for Yucca Mountain given that the petitioner lives 18 miles from the site in which the government plans to bury 70,000 metric tons of radioactive waste, despite the fact that radionuclides might not reach his property for thousands of years).

<sup>53</sup> ISP Appeal at 9-10.

<sup>54</sup> *Id.* at 11-12.

<sup>55</sup> *Schofield Barracks*, CLI-10-20, 72 NRC at 191.

<sup>56</sup> *Id.*

insufficient to demonstrate standing.<sup>57</sup> However, as the Board found, the NRC has not tied emergency planning requirements into its standing analysis of materials cases as it has in reactor cases.<sup>58</sup> Thus it was not error or abuse of discretion for the Board to reject ISP's claim that a generic determination with respect to emergency planning equates to a judgment that ISFSIs have no "obvious potential for offsite consequences" for the distinct purpose of assessing standing.<sup>59</sup> And once the Board determines potential injury to the petitioners based on proximity to the proposed project, it is not required to weigh the evidence to determine whether the potential harm was beyond doubt.<sup>60</sup>

Given the Commission's direction to construe standing in favor of the petitioner, that the Board's analysis is reasonable, and that the Commission grants the board "substantial deference" in evaluating standing,<sup>61</sup> the Commission should affirm the Board's finding that Sierra Club demonstrated standing.

### **III. The Board Did Not Commit a Legal Error or Abuse Its Discretion in Partially Admitting Sierra Club Contention 13**

In Contention 13, Sierra Club asserted that the ER inadequately describes the environment affected by the proposed CISF because the ER does not discuss any studies to determine whether the project impacts the Texas horned lizard and the dunes sagebrush

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<sup>57</sup> ISP Appeal at 10 n.49.

<sup>58</sup> *Ross ISR*, CLI-12-12, 75 NRC at 610 n.32 (explaining that there is no similar emergency zone in materials cases to tie a proximity presumption to but not precluding a proximity presumption based on other factors for such cases).

<sup>59</sup> *Diablo Canyon ISFSI*, LBP-02-23, 56 NRC at 427 (citations omitted).

<sup>60</sup> *Ross ISR*, CLI-12-12, 75 NRC at 604.

<sup>61</sup> *Turkey Point*, CLI-15-25, 82 NRC at 394 n.32 (normally the Commission will not disturb the Board's standing decision unless there is a "clear misapplication of the facts or misunderstanding of law."); see also *Pac. Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-16-9, 83 NRC 472, 482 (2016) (discussing Commission's substantial deference on standing).

lizard.<sup>62</sup> The Board admitted the contention, in part, as a contention of omission.<sup>63</sup> On appeal, ISP asserts that it was legal error and an abuse of discretion to allow Sierra Club to raise Council on Environmental Quality (CEQ) regulations for the first time in its reply before the Board and also legal error to apply the CEQ requirement to an applicant.<sup>64</sup> As further discussed below, neither claim meets the high threshold for disturbing the Board's ruling, and the Commission should affirm the Board's decision.

The Staff agrees that a reply brief cannot be used to make new arguments that provide "the necessary threshold support for contentions."<sup>65</sup> The Staff also agrees that because Sierra Club invoked the CEQ regulations for the first time in its reply, it would be impermissible for the Board's ruling on the contention to rely on an asserted failure of the ER to comply with CEQ regulations. However, it appears that the Board ultimately based its ruling on its interpretation of the contention's challenge to the ER's description of the "affected environment" under 10 C.F.R. § 51.45. The Board noted that it was undisputed that none of the five cited sources in ER Section 3.5.16 on which ISP relied in discussing the lizard species was publicly available (and that the NRC Staff itself had tried unsuccessfully to locate them).<sup>66</sup> The Board found that the absence of the source materials provided sufficient support (though solely as a contention of omission) for Sierra Club's original assertion: that the sources on which the ER conclusion was based were insufficiently discussed to adequately describe the affected environment. Based on that understanding of the facts, ISP does not show that its basis for appeal—the Board's denial

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<sup>62</sup> Sierra Club Petition at 78.

<sup>63</sup> *ISP*, LBP-19-7, 90 NRC at \_\_\_ (slip op. at 56). NRC Staff opposed admission of this contention below, asserting that Sierra Club failed to provide adequate support for its claim and did not articulate a genuine dispute with the applicant on a material issue in contravention of 10 C.F.R. § 2.309(f)(1)(v)-(vi). NRC Staff Response at 119–21.

<sup>64</sup> *ISP* Appeal at 16–19.

<sup>65</sup> *Id.* at 17 (citing *Nat'l Enrichment Facility*, CLI-04-35, 60 NRC at 623).

<sup>66</sup> *ISP*, LBP-19-7, 90 NRC at \_\_\_ (slip op. at 54–55).



of its motion to strike Sierra Club's new reference to CEQ regulations—was ultimately a legal error or abuse of discretion.

For this same reason, ISP's related argument—that CEQ regulations do not apply to applicants (only to the NRC)—does not provide a basis for reversing the Board's decision.<sup>67</sup> Here the Board acknowledged that the CEQ regulations provide *guidance* regarding the NRC's implementation of NEPA,<sup>68</sup> and the proxy for that review at this stage is the ER's discussion of the affected environment (per 10 C.F.R. § 51.45), to which Contention 13 was directed. Therefore, ISP does not show that the Board's description of the guidance provided by CEQ regulations ultimately constituted a legal error requiring reversal of its admission in part of Contention 13.

For the reasons stated above, ISP does not demonstrate any error of law or abuse of discretion in the Board's determination in LBP-19-7 that Sierra Club Contention 13 is admissible as a contention of omission. Therefore, 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,

**/Signed (electronically) by/**

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<sup>67</sup> In any event, ISP's premise seems to be that a petitioner seeking to challenge the availability of information the applicant used to evaluate the "affected environment" must await the EIS because such a claim can only be raised against the NRC Staff. But that interpretation is not tenable, as it contradicts the requirement in 10 C.F.R. § 2.309(f)(2) that NEPA-based challenges must be raised in the first instance against the applicant's ER.

<sup>68</sup> *ISP*, LBP-19-7, 90 NRC at \_\_ (slip op. at 55).

**Executed in Accord with 10 CFR 2.304(d)**

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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 Interim Storage Partners LLC's Appeal 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