

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

LBP-19-9

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman  
Nicholas G. Trikouros  
Dr. Gary S. Arnold

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050-ISFSI

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

November 18, 2019

MEMORANDUM AND ORDER

(Ruling on Motion to Dismiss and Motion to Amend Contention 13)

Before the Board are (1) a motion by Interim Storage Partners LLC (ISP) to dismiss Sierra Club Contention 13;<sup>1</sup> and (2) a motion by Sierra Club to amend the same contention.<sup>2</sup> Because Contention 13, as admitted by the Board, is now moot, we grant ISP's motion to dismiss it. Because Sierra Club proffers an amended Contention 13 that is not admissible, we deny its motion to amend.<sup>3</sup>

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<sup>1</sup> Interim Storage Partners LLC's Motion to Dismiss Sierra Club's Contention 13 as Moot and Terminate This Proceeding (Sept. 9, 2019) [hereinafter ISP Motion to Dismiss].

<sup>2</sup> Sierra Club's Motion to Amend Contention 13 (Sept. 13, 2019) [hereinafter Sierra Club Motion to Amend].

<sup>3</sup> We do not terminate this proceeding, however, because one other proffered contention is pending. On November 13, 2019, the Office of the Secretary referred a motion for leave to file a late-filed contention that was submitted on October 23, 2019 by the Sustainable Energy and Economic Development Coalition (SEED). The time for briefing SEED's motion has not yet expired.

## I. BACKGROUND

The background of this proceeding is set forth in detail in the Board's August 23, 2019 Memorandum and Order,<sup>4</sup> but is summarized below.

In April 2016, Waste Control Specialists LLC (WCS) submitted an application to the Nuclear Regulatory Commission (NRC) for a license to construct and operate a consolidated interim storage facility for spent nuclear fuel and greater-than-Class C waste in Andrews County, Texas.<sup>5</sup> A year later, WCS asked the NRC to suspend consideration of its application.<sup>6</sup> Thereafter, WCS merged with Orano CIS LLC to form ISP.<sup>7</sup>

In June 2018, ISP submitted a revised license application,<sup>8</sup> and the NRC issued a Federal Register notice that permitted the public to request a hearing and petition to intervene.<sup>9</sup> Sierra Club filed a timely hearing request<sup>10</sup> (as did others). After briefing, the Board heard oral argument in Midland, Texas concerning petitioners' standing and the admissibility of their contentions.<sup>11</sup>

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<sup>4</sup> LBP-19-7, 90 NRC \_\_, \_\_–\_\_ (slip op. at 6–12) (Aug. 23, 2019).

<sup>5</sup> Waste Control Specialists LLC, Application for a License for a Consolidated Interim Spent Fuel Storage Facility (Apr. 28, 2016) (ADAMS Accession No. ML16133A100).

<sup>6</sup> Joint Request to Withdraw the Federal Register Notice Providing an Opportunity to Submit Hearing Requests (Apr. 19, 2017), Attach. 1, Letter from Rod Baltzer, WCS President and CEO, to NRC Document Control Desk (Apr. 18, 2017) (ADAMS Accession No. ML17109A480).

<sup>7</sup> Interim Storage Partners LLC License Application, Docket 72-1050, Andrews County, Texas, (rev. 2 July 2018) at 1-1, 1-4 (ADAMS Accession No. ML18206A483).

<sup>8</sup> Letter from Jeffery D. Isakson, ISP, to NRC Document Control Desk (June 8, 2018) (ADAMS Accession No. ML18166A003).

<sup>9</sup> Interim Storage Partners Waste Control Specialists Consolidated Interim Storage Facility, 83 Fed. Reg. 44,070, 44,070–75 (Aug. 29, 2018), corrected, 83 Fed. Reg. 44,680 (Aug. 31, 2018) (correcting the deadline date for petitioners to request a hearing to October 29, 2018). The Secretary of the Commission later extended this deadline to November 13, 2018. Order of the Secretary (Oct. 25, 2018) at 2.

<sup>10</sup> Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Nov. 13, 2018) [hereinafter Sierra Club Hearing Petition].

<sup>11</sup> Licensing Board Notice and Order (Establishing Dates and Location of Oral Argument) (May 24, 2019) at 1 (unpublished).

In LBP-19-7, we denied the hearing requests of all other petitioners, but granted Sierra Club's hearing request and admitted one contention (Sierra Club Contention 13) that challenged the adequacy of ISP's discussion, in its Environmental Report, of the Texas horned lizard and the dunes sagebrush lizard (also known as the sand dune lizard). Sierra Club Contention 13 asserted in part that "there is no discussion of any studies or surveys to determine if the species are present and the impact of the project on those species."<sup>12</sup>

We observed (and ISP did not dispute<sup>13</sup>) that none of the studies cited in section 3.5.16 of ISP's Environmental Report—the studies on which ISP relied in discussing both species—was publicly available.<sup>14</sup> As a result, we concluded, "no interested member of the public could access any of these studies, or learn how many people performed them, what their qualifications were, or how much time they spent."<sup>15</sup> Accordingly, we admitted Sierra Club Contention 13 in part, "solely as a contention of omission," because none of the studies listed in section 3.5.16 of ISP's Environmental Report was "either sufficiently described to judge its technical adequacy or made publicly available."<sup>16</sup>

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<sup>12</sup> Sierra Club Hearing Petition at 78.

<sup>13</sup> See Interim Storage Partners LLC's Answer Opposing Hearing Request and Petition to Intervene Filed by Sierra Club (Dec. 10, 2018) at 109.

<sup>14</sup> LBP-19-7, 90 NRC at \_\_ (slip op. at 54).

<sup>15</sup> Id. at \_\_–\_\_ (slip op. at 54–55).

<sup>16</sup> Id. at \_\_ (slip op. at 56).

Thereafter, ISP supplemented its Environmental Report with copies of (or the applicable ADAMS accession numbers for) each of the studies referenced in section 3.5.16.<sup>17</sup> With the concurrence of the NRC Staff,<sup>18</sup> ISP then moved to dismiss Sierra Club's Contention 13 as moot and to terminate this proceeding.<sup>19</sup> Sierra Club opposed,<sup>20</sup> and moved to amend Contention 13.<sup>21</sup> Both ISP and the NRC Staff oppose Sierra Club's motion to amend.<sup>22</sup>

## II. ANALYSIS

### A. Motion to Dismiss Contention 13 as Moot

As explained above, we admitted Sierra Club Contention 13 "solely as a contention of omission."<sup>23</sup> Such a contention is cured when the applicant supplies the missing information.<sup>24</sup> When the missing information "is later supplied by the applicant . . . the contention is 'moot'" and should be dismissed.<sup>25</sup>

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<sup>17</sup> Letter from Jack Boshoven, Chief Engineer, ISP, to Document Control Desk, Division of Spent Fuel Management, NRC (Sept. 4, 2019) (ADAMS Accession No. ML19248C915) [hereinafter ISP Letter Providing Supplemental References].

<sup>18</sup> Pursuant to 10 C.F.R. § 2.323(b), ISP certified with its motion that "[t]he NRC staff agrees that the documents and references provided cure the omission identified in the Board's order" and therefore "supports the proposed motion." See ISP Motion to Dismiss.

<sup>19</sup> ISP Motion to Dismiss at 1.

<sup>20</sup> Sierra Club's Resistance to ISP's Motion to Dismiss Sierra Club's Contention 13 at 2–5 (Sept. 12, 2019).

<sup>21</sup> Sierra Club Motion to Amend; see also Amended Contention 13 (Sept. 13, 2019) [hereinafter Amended Contention 13].

<sup>22</sup> Interim Storage Partners LLC's Answer Opposing Sierra Club's Motion to Amend Contention 13 (Oct. 1, 2019) [hereinafter ISP Answer]; NRC Staff Answer in Opposition to Sierra Club's Amended Contention 13 (Oct. 7, 2019) [hereinafter NRC Staff Answer]. Sierra Club replied to each answer. See Sierra Club's Reply to ISP's Answer to Sierra Club's Motion to Amend Contention 13 (Oct. 7, 2019) [hereinafter Sierra Club Reply to ISP]; Sierra Club's Reply to NRC Staff's Answer to Sierra Club's Motion to Amend Contention 13 (Oct. 14, 2019) [hereinafter Sierra Club Reply to NRC Staff].

<sup>23</sup> LBP-19-7, 90 NRC at \_\_\_ (slip op. at 56).

<sup>24</sup> See Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002).

<sup>25</sup> See id.; accord USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 444 (2006).

Because ISP made available all the studies listed in section 3.5.16 of its Environmental Report, it cured the omission. Sierra Club Contention 13, as initially admitted by the Board, is dismissed as moot.

B. Motion to Amend Contention 13

The remaining question is whether Sierra Club's motion to amend Contention 13 should be granted. Sierra Club's amended Contention 13 claims that the previously unavailable studies listed in section 3.5.16 of ISP's Environmental Report do not, in fact, adequately support the content of the Report. Specifically, the contention states:

The [Environmental Report] 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 [Environmental Report] then makes the unsupported statement that the [consolidated interim storage] 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 [Environmental Report] that the [consolidated interim storage] 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 [Environmental Report] does not reference any current studies or surveys. Therefore, the [Environmental Report] is inadequate in describing the affected environment.<sup>26</sup>

1. Good Cause

Any petitioner that proffers a new or amended contention after the initial deadline for hearing requests must demonstrate good cause for doing so.<sup>27</sup> Otherwise, the NRC's rules provide, such a contention "will not be entertained."<sup>28</sup>

To establish good cause, a petitioner must show that (1) the information upon which the new or amended contention is based was not previously available; (2) the information upon which the contention is based is materially different from information previously available; and

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<sup>26</sup> Amended Contention 13 at 1.

<sup>27</sup> See 10 C.F.R. § 2.309(c)(1).

<sup>28</sup> Id.

(3) the contention has been submitted in a timely fashion after the new information on which it is based becomes available.<sup>29</sup>

It is not disputed that Sierra Club has satisfied the first and third requirements. In accordance with the Board's order,<sup>30</sup> Sierra Club proffered its amended contention on September 13, 2019—well within thirty days of ISP's first making the studies available. As ISP concedes: "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."<sup>31</sup>

Both ISP and the NRC Staff argue, however, that we should not even "entertain" Sierra Club's motion because, they claim, statements in ISP's Environmental Report are not "materially different" from information in the supporting studies that ISP has now made available.<sup>32</sup> Opining that "[t]he Commission does not look favorably upon amended or new environmental contentions made after the initial filing deadline,"<sup>33</sup> ISP cites caselaw to the effect that premising a newly proffered contention on previously available information renders the contention "impermissibly late."<sup>34</sup>

A majority of the Board declines to apply the NRC's screening test for late submissions to prevent our even considering the admissibility of Sierra Club's amended Contention 13. There are material differences between the unsupported assertions in ISP's Environmental Report and the recently available, more detailed studies on which those assertions were

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<sup>29</sup> See id. § 2.309(c)(1)(i)–(iii).

<sup>30</sup> Licensing Board Order (Scheduling Initial Scheduling Conference) (Sept. 5, 2019) at 1 (unpublished).

<sup>31</sup> ISP Answer at 7 (footnotes omitted).

<sup>32</sup> Id. at 6–15; NRC Staff Answer at 6–10.

<sup>33</sup> ISP Answer at 6.

<sup>34</sup> Id. at 7 (citing DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 3), CLI-15-1, 81 NRC 1, 7 (2015)).

based.<sup>35</sup> ISP's own pleadings demonstrate as much. For example, although initially the Board was troubled by our (or anyone's) inability to know how the studies cited by ISP were conducted, ISP now points out that the 1997 "surveys were conducted by a team of five doctoral-level research scientists whose credentials are summarized in the 1997 Report."<sup>36</sup> Therefore, ISP now argues, "there is zero basis for Sierra Club's suggestion that the surveys lacked scientific validity or rigor."<sup>37</sup> This may not be helpful to Sierra Club, but surely it is material and new information.<sup>38</sup>

In the view of the Board's majority, therefore, the dispositive issue is not whether Sierra Club's amended contention was filed out of time without "good cause," as ISP and the NRC Staff would have us conclude.<sup>39</sup> Rather, it is whether Sierra Club has identified information in the recently available studies that raises a genuine dispute with ISP's Environmental Report. As

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<sup>35</sup> As used in 10 C.F.R. § 2.309(c)(1)(ii), "materially different" simply means significantly different from information that was previously available. See Fla. Power & Light Co. (Turkey Point Units 6 & 7), LBP-17-6, 86 NRC 37, 48 (2017).

<sup>36</sup> ISP Answer at 10.

<sup>37</sup> Id.

<sup>38</sup> Our concurring colleague undertakes a careful analysis of Sierra Club's amended Contention 13 and concludes that, contrary to what it purports to be, the contention is not actually based on any of the recently available, materially different information. Although we ultimately reach the same result, a majority of the Board determines such an analysis to be more appropriately conducted under the contention admissibility criteria (10 C.F.R. §2.309(f)(1)) than under 10 C.F.R. § 2.309(c)(1). As a unanimous Board cautioned in Holtec, we should not conflate the screening test for merely filing a contention out of time with the requirements for admitting it. See Holtec Int'l (HI-STORE Consol. Interim Storage Facility), LBP-19-4, 89 NRC \_\_, \_\_–\_\_ (slip op. at 81–82) (May 7, 2019). "We do not demand a petitioner establish the admissibility . . . of a contention before allowing it to be filed." Id. at \_\_ (slip op. at 82).

<sup>39</sup> However, we do agree with ISP (see ISP Answer at 8) that Sierra Club's amended Contention 13 is untimely to the extent it claims the studies cited in section 3.5.16 of ISP's Environmental Report are "11-22 years out of date." The dates of the studies were disclosed in section 3.5.16 from the outset, and Sierra Club failed to challenge their age in its initial petition. Moreover, we are not aware of any factual or legal requirement to necessarily use newer studies, and Sierra Club cites none.

explained below (and as ISP and the NRC Staff argue in the alternative<sup>40</sup>), Sierra Club has failed to do so.

## 2. Contention Admissibility

Although Sierra Club may have good cause for proffering its amended contention after the initial deadline, its contention must also satisfy the usual requirements for contention admissibility.<sup>41</sup> While we do not adjudicate disputed facts at this stage, an admissible contention must, among other things (1) show that a genuine dispute exists on a material issue of law or fact by referring to specific portions of the application that the petitioner disputes; and (2) state the alleged facts or expert opinions that support the petitioner's position.<sup>42</sup>

In accordance with 10 C.F.R. § 51.45,<sup>43</sup> we therefore consider two separate but related questions: First, has Sierra Club raised a genuine dispute as to whether the recently available studies adequately support the factual description of the affected environment in ISP's Environmental Report? Second, based on the same studies, has Sierra Club raised a genuine dispute as to whether ISP's characterization of the environmental impact is reasonable?<sup>44</sup>

Concerning the first question, amended Contention 13 alleges discrepancies between ISP's Environmental Report and four of the recently available studies.<sup>45</sup> On close examination,

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<sup>40</sup> ISP Answer at 17–20; NRC Staff Answer at 10–14.

<sup>41</sup> See 10 C.F.R. § 2.309(f)(1).

<sup>42</sup> Id. § 2.309(f)(1)(v)–(vi).

<sup>43</sup> 10 C.F.R. § 51.45 requires that an applicant's environmental report contain a discussion of the affected environment and of the environmental impact of the proposed project.

<sup>44</sup> Similar to the proffered amended contention, the original Sierra Club Contention 13 challenged both the adequacy of ISP's description of the affected environment and ISP's conclusions concerning the impact of its proposed facility on the dunes sagebrush lizard and the Texas horned lizard. See Sierra Club Hearing Petition at 78. Although we did not initially admit these issues (pending the availability of ISP's supporting references), Sierra Club has not waived the right to address them.

<sup>45</sup> "Ecological Assessment of the Low Level Waste Depository, Andrew County, Texas," Final Report, Ecology Group (May 1997) [hereinafter 1997 Report]; "Habitat Characterization and Rare Species Survey for the Low Level Waste Repository, Andrews County, Texas," Final

however, no significant discrepancies exist. Therefore, Sierra Club fails to raise a genuine dispute as to whether the studies adequately support ISP's description of the affected environment for the dunes sagebrush lizard and the Texas horned lizard.<sup>46</sup>

For example, Sierra Club claims that the 1997 Report only considered species within one mile of the core area of the existing low-level radioactive waste (LLRW) site, and that ISP's proposed facility is "beyond that one mile radius."<sup>47</sup> It further claims that the 1997 Report reflects only "casual observations" of reptiles and amphibians rather than a "scientific survey."<sup>48</sup>

But, as ISP explains in detail,<sup>49</sup> these statements are incorrect. Although ISP's Environmental Report does not specify the exact areal extent of the wildlife surveys described in the 1997 Report, the Environmental Report clearly shows that ISP's proposed facility would be located within a mile of the LLRW site and, therefore, within the survey area described in the 1997 Report.<sup>50</sup> Sierra Club's claim that the 1997 Report (and hence ISP's Environmental Report) contains only "casual observations"<sup>51</sup> is refuted by a review of the 1997 Report itself. Not only were "environmental and ecological surveys conducted . . . to provide an unbiased assessment of the native flora and fauna immediately surrounding the core area,"<sup>52</sup> but five sites

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Report, Doug Reagan & Associates (Oct. 25, 2004) [hereinafter 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) [hereinafter 2007 Report]; "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) [hereinafter 2008 Report].

<sup>46</sup> See 10 C.F.R. § 2.309(f)(1)(vi).

<sup>47</sup> Amended Contention 13 at 2.

<sup>48</sup> Id.

<sup>49</sup> ISP Answer at 8–10.

<sup>50</sup> See WCS Consolidated Interim Spent Fuel Storage Facility Environmental Report, Docket No. 72-1050 (rev. 2 July 2018) at 3-87 (Fig. 3.1-3) [hereinafter Environmental Report] (ADAMS Accession No. ML18221A405 (package)).

<sup>51</sup> Amended Contention 13 at 2.

<sup>52</sup> 1997 Report at 3 (emphasis added).

in the region were surveyed.<sup>53</sup> Moreover, as noted supra, the surveys were conducted by a team of five doctoral-level research scientists whose credentials were summarized,<sup>54</sup> and whose expertise Sierra Club does not dispute.

Likewise, Sierra Club purports to rely on statements in the 2004 Report regarding the locations of suitable habitat.<sup>55</sup> As ISP points out,<sup>56</sup> however, Sierra Club merely summarizes statements in the 2004 Report that are repeated, nearly word for word, in ISP's Environmental Report.<sup>57</sup> There is no conflict between the 2004 Report and ISP's Environmental Report.

Similarly, Sierra Club's claims concerning the 2007 Report demonstrate no such conflict. Sierra Club focuses on a statement in the 2007 Report that suitable habitat for the dunes sagebrush lizard does occur "in the area around the site"<sup>58</sup> and on the fact that the 2007 Report lists the Texas horned lizard as being observed at the LLRW site.<sup>59</sup>

However, ISP's Environmental Report addresses habitat in detail.<sup>60</sup> It concludes that, "although the area has some components of sand dune lizard habitat, various factors make it unsuitable."<sup>61</sup> As discussed in ISP's Environmental Report, these adverse factors include a high

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<sup>53</sup> Id. at 7.

<sup>54</sup> See id. at 4, 108–09.

<sup>55</sup> Amended Contention 13 at 3.

<sup>56</sup> ISP Answer at 10–12.

<sup>57</sup> Compare 2004 Report at 6–7, with Environmental Report at 3-29 to -35.

<sup>58</sup> Amended Contention 13 at 3.

<sup>59</sup> Id.

<sup>60</sup> Sierra Club challenges ISP's drawing upon (in addition to the studies of its own property) studies that were conducted at the nearby National Enrichment Facility site (NEF) in New Mexico. Sierra Club Reply to ISP at 3–4; Sierra Club Reply to NRC Staff at 4–5. Sierra Club claims that "[a]ny reference to the New Mexico survey is completely irrelevant to the ISP facility." Sierra Club Reply to ISP at 4. As ISP explains, however, due to their close geographic proximity and comparable ecological resources, the ecology of ISP's proposed site is "highly comparable to that of the URENCO NEF." Environmental Report at 4-34. Moreover, "[t]he NEF was extensively studied during [the] NRC licensing process." Id.

<sup>61</sup> Environmental Report at 4-37.

frequency of mesquite and grassland vegetation associations (which do not support dunes sagebrush lizard communities) and a low frequency of shinnery oak dunes and large blowouts (which provide the habitat and microhabitat necessary for the dunes sagebrush lizard's survival).<sup>62</sup> Thus, ISP's Environmental Report directly addresses the potential for suitable habitat conditions in the area, but explains that such habitat areas are small and isolated from each other, and that field surveys have not identified any dunes sagebrush lizards on the site of ISP's proposed storage facility.<sup>63</sup> In contrast (and fully consistent with the 2007 Report), ISP's Environmental Report readily acknowledges that "[t]he Texas horned lizard has been reported as present on the property" (albeit not necessarily at the specific location of the proposed facility).<sup>64</sup>

Lastly, Sierra Club's discussion of the 2008 Report identifies no conflict with either the earlier studies or statements in ISP's Environmental Report. As disclosed in the Environmental Report, the 2008 Report was an environmental assessment prepared to support relicensing of the LLRW facility.<sup>65</sup> Although Sierra Club appears to challenge the scope of the 2008 Report,<sup>66</sup> it was never intended as a survey itself, but rather as a summary of the surveys described in the 1997, 2004 and 2007 Reports. In sum, no significant differences exist between the description of the affected environment in ISP's Environmental Report and the picture presented by the recently available studies.

Nor has Sierra Club demonstrated a genuine dispute as to the second question: that is, whether ISP's conclusions concerning the impact of its proposed facility are reasonable.

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<sup>62</sup> Id. at 3-35.

<sup>63</sup> Id. at 3-34 to -37.

<sup>64</sup> Id. at 3-34. The NRC Staff reminds us that the site of the proposed storage facility comprises only 2.37 percent of the 14,000-acre WCS property. NRC Staff Answer at 12 n.67.

<sup>65</sup> Environmental Report at 3-40.

<sup>66</sup> See Amended Contention 13 at 3.

First, it is simply not the case, as Sierra Club alleges, that ISP's Environmental Report says the proposed storage facility would have "no impact" on the dunes sagebrush lizard or the Texas horned lizard. Rather, at most ISP claims that the impact would be "small."<sup>67</sup> And, in other respects, ISP candidly acknowledges potential adverse consequences, such as the fact that "[t]he Texas horned lizard is vulnerable to construction activities that could result in a direct loss of breeding habitat."<sup>68</sup>

Second, the affected property would constitute a small percentage of ISP's holdings and a small percentage of the suitable habitat throughout the region. As ISP's Environmental Report observes, in the general region of the proposed facility "there are several thousand acres of sand dune formation that would not be impacted by the project."<sup>69</sup> Moreover, neither the dunes sagebrush 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.<sup>70</sup>

Finally, ISP's characterization of a "small" impact is further premised on two factual assumptions: "the Texas horned lizard and the sand dune lizard either do not occur on the [proposed facility site] or are highly adaptable."<sup>71</sup>

The likelihood that the dunes sagebrush lizard is not even present at the site of the proposed facility is consistent with ISP's recently available studies, as is the possibility that the Texas horned lizard is not present either. Neither species was specifically identified at the site

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<sup>67</sup> Environmental Report at 4-38.

<sup>68</sup> Id. at 4-37.

<sup>69</sup> Id.

<sup>70</sup> Id. at 3-34.

<sup>71</sup> Id. at 4-38.

in any survey, although the Texas horned lizard is considered widespread in the region.<sup>72</sup> That both species are “highly adaptable” is supported by the determination that these are “highly mobile species and may not be as susceptible to localized physical and chemical pollutants as other less mobile species such as invertebrates and aquatic species.”<sup>73</sup> Plainly put, ISP posits that the species are “highly adaptable” because lizards have legs.

ISP’s last conclusion—that, at the first sight of construction equipment, any resident lizards would likely scurry away to other nearby habitat—may find less support in any of ISP’s cited studies than in common sense. But it is not unreasonable on its face. And, most importantly, Sierra Club fails to cite any facts or expert opinions—either its own or from ISP’s recently available studies—to suggest that ISP’s conclusion is not a reasonable one.<sup>74</sup> Accordingly, Sierra Club fails to raise a genuine dispute, as required by 10 C.F.R. § 2.309 (f)(1)(vi).

Given unlimited time and resources, no doubt any environmental report could be improved. As directed by the Commission, however, we do not “flyspeck” applicants’ environmental reports.<sup>75</sup> Provided its Environmental Report “comes to grips with all important considerations,” ISP need do nothing more.<sup>76</sup>

Sierra Club’s amended Contention 13 is not admissible.

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<sup>72</sup> As summarized in ISP’s Environmental Report, the Texas horned lizard was reported as present on the property controlled by WCS in previous surveys, and suitable habitat is present throughout much of the area. Id. at 3-34. The dunes sagebrush lizard was previously reported in the area northwest of the proposed facility, and areas to the west, north, northeast, south, and southeast have the potential to be suitable habitat. One juvenile lizard, presumed to be a dunes sagebrush lizard, was captured and released approximately 2.5 miles southeast of the proposed facility. Id. at 3-34 to -35.

<sup>73</sup> Id. at 4-38.

<sup>74</sup> See 10 C.F.R. § 2.309(f)(1)(v).

<sup>75</sup> System Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005).

<sup>76</sup> Id.

III. ORDER

For the foregoing reasons:

A. ISP's motion to dismiss Contention 13 as moot is granted. Contention 13, as admitted by the Board, is dismissed.

B. Sierra Club's motion for leave to amend Contention 13 is denied.

Any appeal of this decision to the Commission shall be filed in conformity with 10 C.F.R. § 2.311.

It is so ORDERED.

THE ATOMIC SAFETY  
AND LICENSING BOARD

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Paul S. Ryerson, Chairman  
ADMINISTRATIVE JUDGE

/RA/

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Nicholas G. Trikouros  
ADMINISTRATIVE JUDGE

/RA/

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Dr. Gary S. Arnold  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
November 18, 2019

### Concurring Opinion of Judge Arnold

I fully agree with the Board majority that Sierra Club's original Contention 13 is moot and that amended Contention 13 is not admissible. However, I respectfully disagree with the majority regarding one aspect of this order. The majority believes that Sierra Club's amended Contention 13 is based on new information that is materially different from previously available information. I disagree.

To establish good cause for filing a contention after the initial deadline for submitting contentions, an intervenor must, among other things, show that the new information upon which the amended contention is based is materially different from previously available information.<sup>1</sup> The majority does not find the information on which the amended contention is based to be both new and materially different. Rather, the majority finds that the previously available information has acquired the quality of credibility it previously did not, and that this credibility renders it materially different. That is, certain information in the Environmental Report consisted of unsupported statements, whereas the "new" (yet same) information is supported by study descriptions that were provided in the recently available documents. The majority considers this change in quality a material difference. I will not disagree. However, this difference is not identified by Sierra Club, and its amended contention does not depend on this change in information quality.

Sierra Club's motion to amend clearly discusses good cause for filing this motion after the initial contention deadline. Discussion of materially different information commences with the sentence, "(ii) [t]he information upon which the filing is based is materially different than information previously available."<sup>2</sup> This is followed by a two-page discussion in which Sierra

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<sup>1</sup> See 10 C.F.R § 2.309(c)(1)(ii).

<sup>2</sup> Sierra Club Motion to Amend at 2.

Club cites the specific information it considers new and material. Specifically, this information states:

- 1) "The 1997 document, at page 3, states that it only considered species within one mile of the core area of the LLRW site."<sup>3</sup>
- 2) "Page 4 of [the 1997] document states that reptiles and amphibians were observed."<sup>4</sup>
- 3) "The 2004 document, at page 6, states that the sand dune lizard was observed in the area of the LLRW site."<sup>5</sup>
- 4) "[T]he [2004] 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."<sup>6</sup>
- 5) "The [2004] document goes on to state, however, that suitable sand dune lizard habitat exists west, north, northeast, south, and southeast of the LLRW site."<sup>7</sup>
- 6) "[T]he [2004] 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."<sup>8</sup>
- 7) "The 2007 document, at page 59, as in the previous documents, states that the sand dune lizard does not occur on the site of the LLRW project, but suitable habitat does occur in the area around the site."<sup>9</sup>
- 8) "A table on page 60 of the 2007 document lists the Texas horned lizard as being observed on the LLRW site."<sup>10</sup>
- 9) "Pages 11-12 of the [2008] document mention the horned lizard and dunes sagebrush lizard but it simply says that the horned lizard is in the area and there is no dunes sagebrush lizard habitat on the site."<sup>11</sup>

Sierra Club concludes the list of differences, summarizing, "[t]his is the very information that the ASLB said was missing and to which Sierra Club was entitled in order to adequately

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<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id. at 3.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

evaluate the information in the [Environmental Report]. Therefore, this is material information that was not previously available.”<sup>12</sup>

In response, ISP’s answer to this motion details how each of these statements was previously available in the Environmental Report, either in words nearly identical to the recently provided document or in a paraphrased form.<sup>13</sup>

The Board considers the information materially different because it is now information supported by documented surveys and does not just consist of unsupported statements in the Environmental Report. However, Sierra Club has not advanced this concept of materially different. Sierra Club simply states that this information was provided following Board action, so it is thus new and material.

The facts concerning the lizards are the same in both the Environmental Report and the new supporting documents. The amended contention is based on information and facts that ISP has shown to be the same in the Environmental Report and the supporting survey documents. The contention is not based on the material difference discerned by the Board.

When ISP supplemented its Environmental Report with copies of (or ADAMS accession numbers for) the studies referenced in section 3.5.16 of the Environmental Report, new and materially different information was provided.<sup>14</sup> However, this new and material information consists of the description of the studies, which provides support for certain conclusory statements previously made in the Environmental Report. Further, this information did indeed alter the quality of the conclusory statements in the Environmental Report as agreed by the majority. However, it is the survey information that is new and material, not the conclusory statements. Sierra Club’s argument concerning new and material information focuses on

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<sup>12</sup> Id.

<sup>13</sup> ISP Answer at 10–14.

<sup>14</sup> See ISP Letter Providing Supplemental References.

conclusory statements and neglects the real new and material information provided by the surveys. Every alleged fact used by Sierra Club to support the amended contention was available from the Environmental Report. Therefore, I cannot conclude that Sierra Club has established that its amended Contention 13 is based on new information that is materially different from previously available information. Thus, Sierra Club has not established good cause for its motion.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

In the Matter of )  
 )  
INTERIM STORAGE PARTNERS LLC ) Docket No. 72-1050-ISFSI  
 )  
(WCS Consolidated Interim Storage Facility) )  
 )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Ruling on Motion to Dismiss and Motion to Amend Contention 13) (LBP-19-9)** have been served upon the following persons by the Electronic Information Exchange:

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**Docket No. 72-1050-ISFSI  
MEMORANDUM AND ORDER (Ruling on Motion to Dismiss and Motion to Amend  
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[Original signed by Wendy C. Moore \_\_\_\_]  
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Dated at Rockville, Maryland,  
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