

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of

INTERIM STORAGE PARTNERS LLC  
(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050

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NRC STAFF ANSWER IN OPPOSITION TO SUSTAINABLE ENERGY AND  
ECONOMIC DEVELOPMENT COALITION'S NEW CONTENTION 17

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NRC Staff Answer in Opposition to Sustainable Energy and Economic Development  
Coalition's New Contention 17

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**Introduction**

The U.S. Nuclear Regulatory Commission Staff (Staff) submits this answer opposing Sustainable Energy and Economic Development Coalition's (SEED) motion to admit proposed new Contention 17.<sup>1</sup> For the reasons set forth below, the Atomic Safety and Licensing Board (Board) should deny the proposed new contention because it fails to meet the requirements of 10 C.F.R. § 2.309(c)(1) and § 2.309(f)(1) and is therefore inadmissible.

**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 (SNF) and reactor-related Greater-than-Class-C waste in Andrews County, Texas.<sup>2</sup> About a year later, WCS requested that the NRC temporarily suspend all review activities associated with its application, and the

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<sup>1</sup> *Motion of Intervenor Sustainable Energy and Economic Development Coalition for Leave to File Late-Filed Contention, and Contention 17* (Oct. 13, 2019) (ML19297A226) (Contention 17).

<sup>2</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).

next day WCS and the NRC Staff jointly requested that the then pending hearing opportunity be withdrawn.<sup>3</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>4</sup> 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>5</sup>

On November 13, 2018, the NRC received a petition to intervene and request for a hearing regarding the ISP application from a group of Joint Petitioners that included SEED.<sup>6</sup> Multiple other petitioners also filed hearing requests and petitions to intervene.<sup>7</sup> The Staff and

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<sup>3</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>4</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>5</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>6</sup> *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).

<sup>7</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); *Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club* (Nov. 13, 2018) (ML18317A411).

ISP responded to the Joint Petitioners' petition.<sup>8</sup> The Board held oral argument on standing and contention admissibility on July 10-11, 2019.<sup>9</sup>

Thereafter, the Board issued its decision, finding that SEED had demonstrated standing but denying its hearing request because Joint Petitioners had not submitted a proposed contention that met the requirements of 10 C.F.R. § 2.309(f)(1).<sup>10</sup> The Board only granted Sierra Club's petition, holding that it demonstrated standing and proffered one admissible contention, and denied the other petitions.<sup>11</sup> Joint Petitioners' appeal of LBP-19-7, as well as the appeals of two other petitioners and ISP, are now pending with the Commission.<sup>12</sup>

On September 23, 2019, the U.S. Nuclear Waste Technical Review Board (NWTRB) issued a report, *Preparing for Nuclear Waste Transportation*.<sup>13</sup> SEED submitted a motion for leave to file a late-filed contention and new proposed Contention 17 on October 23, 2019. The Secretary of the Commission, in a November 13, 2019, memorandum, referred SEED's motion to the Board.<sup>14</sup>

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<sup>8</sup> NRC Staff Consolidated Answer to Petitions to Intervene and Requests for Hearing (Dec. 10, 2018) (ML18344A594); Interim Storage Partners LLC's Answer Opposing Hearing Request and Petition to Intervene File by Don't Waste Michigan et al. (Dec. 10, 2018) (ML18344A685).

<sup>9</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>10</sup> Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC \_\_, \_\_ (slip op. at 18, 105-06).

<sup>11</sup> *Id.* at \_\_ (slip op. at 105-06).

<sup>12</sup> See *Don't Waste Michigan, et al., Notice of Appeal of LBP-19-7 and Brief in Support of Appeal* (Sept. 17, 2019) (ML19260J391); see also NRC Staff's Answer in Opposition to *Don't Waste Michigan et al.'s Appeal of LBP-19-7* (Oct. 15, 2019) (ML19288A228); *Interim Storage Partners LLC's Answer Opposing the Appeal of LBP-19-7 by Don't Waste Michigan et al.* (Oct. 15, 2019) (ML19288A282)

<sup>13</sup> U.S. Nuclear Waste Technical Review Board, "Preparing for Nuclear Waste Transportation: Technical Issues that Need to Be Addressed in Preparing for a Nationwide Effort to Transport Spent Nuclear Fuel and High-Level Radioactive Waste" (Sept. 2019) (ML19297A235) (NWTRB Report).

<sup>14</sup> Office of the Secretary, "Referral Memorandum from the Secretary to the Atomic Safety and Licensing Board Panel," (Nov. 13, 2019) (ML19317E079).

## Discussion

### I. Applicable Legal Standards

#### A. Standards for New Contentions

New contentions submitted after the initial date for hearing requests must meet the requirements of 10 C.F.R. § 2.309(c)(1). To do so, a party must demonstrate good cause by showing that the following three conditions are met:

- (i) The information upon which the filing is based was not previously available;
- (ii) The information upon which the filing is based is materially different from information previously available; and
- (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.

The petitioner has the burden of demonstrating that any new contention meets the standards in 10 C.F.R. § 2.309(c)(1).<sup>15</sup>

#### 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.”<sup>16</sup> That section requires that each contention:

- (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;

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<sup>15</sup> *AmerGen Energy Co. (Oyster Creek Nuclear Generating Station)*, CLI-09-7, 69 NRC 235, 260–61 (2009).

<sup>16</sup> *Entergy Nuclear Vt. Yankee, LLC* (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568, 572 (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”).

- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue . . . ; and
- (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact.<sup>17</sup>

The Commission has strictly applied these contention admissibility requirements in NRC adjudications.<sup>18</sup> Failure to comply with any one of these criteria is grounds for the dismissal of a contention.<sup>19</sup> The requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”<sup>20</sup> The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”<sup>21</sup>

Further, a petitioner must do more than assert generally that there are deficiencies in the application. A petitioner must identify all pertinent portions of the document it is challenging and state both the challenged position and the petitioner’s opposing view.<sup>22</sup> To demonstrate a genuine, material dispute, the petitioner must address the specific analysis in the document and explain how it is incorrect.<sup>23</sup> To show that a dispute is “material,” a petitioner must show that its resolution would make a difference in the outcome of the proceeding.<sup>24</sup>

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<sup>17</sup> 10 C.F.R. § 2.309(f)(1)(i)-(vi).

<sup>18</sup> *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118 (2006) (citing *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)).

<sup>19</sup> *Private Fuel Storage, L.L.C.* (Independent 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).

<sup>20</sup> Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

<sup>21</sup> *Id.* (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

<sup>22</sup> *Millstone*, CLI-01-24, 54 NRC at 358.

<sup>23</sup> 10 C.F.R. § 2.309(f)(1)(vi).

<sup>24</sup> See *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3) CLI-99-11, 49 NRC 328, 333–34 (1999).

## **II. SEED Fails to Meet the Standards of 10 C.F.R. § 2.309(c)(1)**

SEED bases its proposed new Contention 17 on information in the NWTRB report issued on September 23, 2019, and filed its new contention thirty days later on October 23, 2019.<sup>25</sup> However, Petitioner's new contention principally relies on information in the NWTRB report that was previously available, and thus does not satisfy 10 C.F.R. § 2.309(c)(1)(i). Central to Petitioner's new contention is its claim that SNF could not be removed from all reactor sites until approximately 2070 to 2100, and that this is not within the 20-year timeframe proposed by ISP nor within the 40-year licensing period.<sup>26</sup> But information asserting that SNF might not meet transportation requirements until as late as 2100 was previously presented in 2013, as the NWTRB report notes.<sup>27</sup> Petitioner cites to a discussion in the NWTRB report about "a condition outside the limits of the [Certificate of Compliance]" that would delay the removal of SNF from some reactor sites.<sup>28</sup> The report, citing to a presentation delivered at an NWTRB workshop in November 2013, describes that the increase in high burnup fuel and SNF stored in large canisters at reactor sites will take longer to cool to meet transportation requirements.<sup>29</sup> Petitioner quotes the report, which, based on this information from 2013, states that the SNF could be repackaged into smaller canisters to "remove SNF from all [reactor] sites by approximately 2070," or without repackaging, "some of the largest SNF canisters storing the hottest SNF would not be cool enough to meet the transportation requirements until approximately 2100."<sup>30</sup> Because this information was presented and publicly available nearly six

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<sup>25</sup> Contention 17 at 7-8.

<sup>26</sup> *Id.* at 8.

<sup>27</sup> NWTRB Report at 77.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Contention 17 at 8 (quoting NWTRB Report at 77). The NWTRB report cites to a November 2013 presentation delivered at a public NWTRB technical workshop by Jeffrey Williams, director of the U.S. Department of Energy (DOE) Nuclear Fuels Storage and Transportation Planning Project. A workshop transcript, showing Williams discussing the timeframe for transporting all SNF from reactor

years ago, Petitioner fails to show good cause as to why it did not raise its contention prior to the initial filing deadline. Because the contention relies on information previously available, Petitioner does not meet 10 C.F.R. § 2.309(c)(1)(i).

Petitioner also fails to meet 10 C.F.R. § 2.309(c)(1)(ii) because it does not show that the newly-available NWTRB report provides materially different information than what the ER already contains. The Commission has stated that materially different information is that which “differs significantly … from the information in the applicant’s documents.”<sup>31</sup> Here, SEED does not show that the NWTRB report provides information that, for purposes of the review of ISP’s application for a 10 C.F.R. Part 72 license, is significantly different than what the application already describes.

The NWTRB report describes “a condition outside the limits of the CoC” when it discusses a delay – highlighted by the Petitioner – in the removal of SNF from some reactor sites until 2070 to 2100 to allow time for SNF to cool to meet transportation requirements.<sup>32</sup> SEED asserts the report identifies issues that “change the expected timing and sequencing of SNF storage activity at the [proposed CISF].”<sup>33</sup> But SEED fails to demonstrate how this information is materially different from ISP’s application, because ISP commits in its application to storing SNF only in dry cask storage systems licensed by the NRC.<sup>34</sup>

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sites at page 54, is publicly available at <https://www.nwtrb.gov/docs/default-source/meetings/2013/november/13nov18.pdf?sfvrsn=9>.

<sup>31</sup> Amendments to Adjudicatory Process Rules and Related Requirements, 77 Fed. Reg. 46,562 at 46,572 (Aug. 3, 2012); see also Powertech (USA), Inc. (*Dewey-Burdock In Situ Uranium Recovery Facility*), CLI-16-20, 84 NRC 219, 240 (2016), aff’g LBP-15-16, 81 NRC 618, 704–05 (2015) (stating that a contention fails to meet 10 C.F.R. § 2.309(c)(1)(ii) when the information is “not materially different from information already in the record”).

<sup>32</sup> NWTRB Report at 77.

<sup>33</sup> Contention 17 at 20.

<sup>34</sup> “Interim Storage Partners LLC Application for Approval of the WCS Consolidated Interim Storage Facility,” rev. 2 (July 2018), at 2-1 (ML18206A483) (discussing information in Table 2-1 “Dry Cask Storage Systems” that lists the licensed storage systems provided by *TN Americas* and NAC International that ISP proposes to use at the CISF).

ER section 1.3.1.1 further states that transportation of SNF from reactor sites to the proposed CISF requires a transportation package approved and certified by the NRC under 10 C.F.R. Part 71.<sup>35</sup> The CoC “ensures the transport packages are designed to maintain confinement of the SNF during shipping and ensure there will not be any radiological release caused by” hypothetical severe accident scenarios.<sup>36</sup> Because ISP proposes to only use NRC-approved cask systems, concerns raised by Petitioner based on the NWTRB report over a delayed timeframe to transport SNF based on conditions outside the limits of a CoC fail to present materially different information. Therefore, SEED does not show that it meets 10 C.F.R. § 2.309(c)(1)(ii).

SEED also asserts that the ER does not address the “DOE mandate” of standardized transportation, aging, and disposal (TAD) canisters.<sup>37</sup> Yet SEED states that this information is from a 2006 *Federal Register* notice and the 2008 Supplemental EIS for Yucca Mountain.<sup>38</sup> This information was thus clearly available to SEED prior to the initial contention filing deadline. Further, in denying Joint Petitioners Contention 11, the Board in LBP-19-7 determined that consideration of repackaging SNF, such as into TAD canisters, is outside the scope of this proceeding.<sup>39</sup> For these reasons, SEED’s claims regarding repackaging and TAD canisters are based on information previously available to the public and are not materially different than the information in the ER, in contravention of 10 C.F.R. § 2.309(c)(1)(i)-(ii).

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<sup>35</sup> ER at 1-8.

<sup>36</sup> *Id.*

<sup>37</sup> Contention at 6-7.

<sup>38</sup> *Id.*

<sup>39</sup> ISP, LBP-19-7, 90 NRC at \_\_ (slip op. at 73) (The Board found that “ISP’s application does not set forth any intent to repackage spent fuel or any analysis of the costs of repackaging the fuel, and the Continued Storage Rule does not require a spent fuel storage facility applicant under Part 72 to include such an analysis beyond the license term [under 10 C.F.R. § 51.23(b)]. Thus, this claim is outside the scope of this proceeding.”).

In sum, SEED does not demonstrate that the NWTRB report on which it bases its new contention offers any information that was either not previously available or materially different from what the application already describes. For these reasons, SEED has not met the requirements of 10 C.F.R. § 2.309(c)(1)(i) and (ii), which is sufficient grounds to deny its motion for failure to show good cause.

### **III. SEED Fails to Meet the Contention Admissibility Standards**

SEED new Contention 17 states:

*The Environmental Report for the ISP/WCS CISF fails to satisfy NEPA in light of findings in a 2019 report published by the U.S. Nuclear Waste Technical Review Board. The NWTRB, as principal scientific and engineering governmental advisory panel for SNF disposition, has concluded that 50 to 80 years will be necessary for DOE to prepare for and accomplish the transportation of spent nuclear fuel to the ISP/WCS facility in west Texas. The NWTRB also found that the lead time needed for resolution for associated technical issues related to transport of the vast majority of the SNF is 10 years or more; that the NRC lacks data to establish a technical basis for the long-term storage of high-burnup SNF and reliability of its fuel cladding under high burnup conditions and will not have results of a DOE study presently under way for about 7 more years; and that there is inadequate data as yet to determine whether high burnup SNF can withstand the rigors of long-distance transportation. Mitigation plans and the discussion of alternatives to shipment of all SNF within a 20-year period consequently have not been sufficiently addressed and disclosed as required by NEPA.<sup>40</sup>*

In Contention 17, SEED asserts that ISP's ER insufficiently addresses and discloses environmental impacts of the transportation of all SNF within a 20-year period because it fails to discuss certain technical issues raised in the NWTRB report. As the basis for its contention, SEED observes that ER section 1.0, the introduction, states that ISP's ER "evaluates the radiological and non-radiological impacts associated with the construction and operation of the CISF."<sup>41</sup> SEED then states that ISP "limit[s] the scope of its ER to the CISF" and excludes a review of environmental impacts of SNF transportation.<sup>42</sup> Petitioner fails to otherwise discuss

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<sup>40</sup> Contention 17 at 5.

<sup>41</sup> *Id.* (quoting ER at 1-1).

<sup>42</sup> *Id.* at 5-6.

specific sections of the ER to demonstrate any asserted deficiencies with the application. SEED further states, as its basis for the contention, that the ER must meet the requirements of 10 C.F.R. § 51.45(b)(1)-(2) to address (1) the impacts of the proposed action on the environment in proportion to their significance, and (2) adverse environmental effects which cannot be avoided if the project is implemented. Petitioner ultimately asserts that based on the “critical determination” of the NWTRB report, and assuming the ISP CISF is licensed in 2021, “there is no scenario” that SNF could be transported to the CISF in the 20-year timeframe proposed by ISP or within the 40-year licensing period.<sup>43</sup> To support its contention, Petitioner also relies on the declaration of Robert Alvarez and incorporates Alvarez’s four conclusions regarding the NWTRB report.

- Long-distance transport of large quantities of SNF is unprecedented.
- Unresolved concerns about the integrity of high-burnup SNF in dry storage may cause prolonged onsite storage for several decades.
- There is a substantial lack of data regarding potential damage to SNF during transportation.
- Repackaging SNF for transport and disposal is an important missing element that has a major impact on the timing and implementation of a national SNF transportation program.<sup>44</sup>

SEED Contention 17 is inadmissible as the Petitioner fails to engage with the application to demonstrate that a genuine dispute exists on a material issue of law or fact in accordance with 10 C.F.R. § 2.309(f)(1)(vi). SEED also raises concerns that are outside the scope of this proceeding and fails to show that its claims are material to NRC’s review, in contravention of 10 C.F.R. § 2.309(f)(1)(iii) and (iv).<sup>45</sup>

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<sup>43</sup> *Id.* at 7-8.

<sup>44</sup> *Id.* at 8-9; Declaration of Robert Alvarez (Oct. 23, 2019) at 1-2 (ML19297A229) (Alvarez Declaration).

<sup>45</sup> Additionally, SEED should have submitted affidavits to demonstrate that it continues to meet the criteria for standing in this proceeding. See *PPL Bell Bend, LLC* (Bell Bend Nuclear Power Plant), CLI-10-7, 71 NRC 133, 138 (2010); *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-4, 37 NRC 156, 162-63 (1993); *accord*, *Tex. Utils. Elec. Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 608 n.4 (1988) (Commission summarily agreed that a petitioner seeking to reenter a proceeding had established standing).

SEED relies on the NWTRB report to support its assertion that SNF will not be able to be transported from reactor sites to ISP's proposed CISF in the 20-year timeframe stated in its application or even in the 40-year licensing period. Petitioner cites to a statement on page 77 of the NWTRB report discussing the need to repack SNF into smaller canisters to cool enough to meet transportation requirements. The report states, "DOE estimated that if SNF was packaged from large casks and canisters to smaller standardized canisters, ... DOE could remove SNF from *all* nuclear power plant sites by approximately 2070. However, if no repackaging occurs, *some* of the largest SNF canisters storing the hottest SNF would not be cool enough to meet the transportation requirements until approximately 2100."<sup>46</sup>

Petitioner's claim, however, fails to acknowledge the NWTRB report's accompanying discussion regarding Technical Issue #13, which explicitly states that the technical issue does not currently preclude transportation of the many casks and canisters that meet CoC transportation requirements.<sup>47</sup> In NRC proceedings, licensing boards have determined that the entire contents of a report relied on for a contention are subject to its scrutiny, including the portions that do not support the petitioner's assertions.<sup>48</sup> Thus, material provided to support a contention faces careful examination by the board to determine whether it supplies adequate support for the contention on its face.<sup>49</sup> And reading the report's entire discussion of Technical Issue #13 contradicts SEED's claim, because it specifies that transportation of SNF is not precluded.

Page 76 of the report states this issue:

*Technical Issue #13. Identify and correct (if needed) individual dry-storage casks and canisters with contents or physical conditions that do not meet the requirements*

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<sup>46</sup> Contention 17 at 8 (quoting NWTRB Report at 77) (emphasis added).

<sup>47</sup> NWTRB Report at 76.

<sup>48</sup> *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-96-2, 43 NRC 61, 90 n.30 (1996); *rev'd in part on other grounds*, CLI-96-7, 43 NRC 235 (1996).

<sup>49</sup> *Tenn. Valley Auth.* (Bellefonte Nuclear Power Plant, Units 3 and 4), LBP-08-16, 68 NRC 361, 385 (2008) (citations omitted).

*specified in the NRC-approved transportation Certificate of Compliance.*

Immediately following this issue statement, the report describes assumptions, conditions, and applicability of the issue, as follows:

*a. This technical issue applies to some, but not all, dry-storage casks and canisters holding commercial SNF.*

*b. Because many of the dry-storage casks and canisters holding commercial SNF meet the CoC transportation requirements, this technical issue, by itself, does not preclude DOE from beginning a transportation campaign—DOE can begin to transport the casks and canisters that meet the CoC requirements while it works to address this technical issue.<sup>50</sup>*

Thus, the full context of Technical Issue #13 refutes Petitioner's assertion that "there is no scenario" that SNF could be transported to the proposed CISF in the timeframe proposed.<sup>51</sup> To the contrary, in its discussion of Technical Issue #13, the NWTRB states that a SNF transportation campaign is not precluded because many SNF canisters meet CoC transportation requirements.<sup>52</sup> The NWTRB explained that transportation of SNF can begin as some technical issues may be addressed quickly and others can be handled over time.

*It is important to note that, while all technical issues must be resolved before the nation's entire inventory of waste can eventually be transported, not all technical issues must be resolved before the first of the waste can be transported. In fact, some technical issues affecting existing waste may be resolved relatively quickly, allowing the waste to be moved early in the process. While this waste is being moved, more difficult technical issues can be addressed over time.<sup>53</sup>*

Petitioner's assertions that transportation of SNF to the proposed CISF will not occur in the timeframe proposed by ISP and that the ER does not adequately describe such transportation delays are not supported by the NWTRB report. A full examination of the report's discussion, which is subject to board scrutiny,<sup>54</sup> contradicts Petitioner's claim that technical

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<sup>50</sup> NWTRB Report at 76.

<sup>51</sup> Contention 17 at 8.

<sup>52</sup> NWTRB Report at 76.

<sup>53</sup> *Id.* at xxiii.

<sup>54</sup> *Yankee Nuclear*, LBP-96-2, 43 NRC at 90 n.30.

issues are incompatible with the transportation of SNF to the CISF should NRC issue ISP a license. Thus, Petitioner fails to demonstrate a genuine dispute with the ER on a material issue of law or fact, as required by 10 C.F.R. § 2.309(f)(1)(vi).

Additionally, the proposed new Contention 17 is inadmissible because, contrary to 10 C.F.R. § 2.309(f)(1)(iv) and (vi), the conclusions from the Alvarez declaration that SEED relies on do not provide sufficient information to show that the alleged omission of information in the ER regarding transportation of SNF to the CISF is material to the findings NRC must make in this proceeding or raises a genuine dispute with the application. A dispute at issue is “material” if its resolution would make a difference in the outcome of the licensing proceeding.<sup>55</sup> Based on Alvarez’s conclusions regarding the NWTRB report, Petitioner raises several transportation safety issues that are considered under 10 C.F.R. Part 71, as the ER and the NWTRB report explain. But Petitioner does not demonstrate how these issues, even taken at face value, would make a difference in the outcome of this licensing proceeding concerning ISP’s application for a Part 72 license. Further, to the extent SEED challenges the safety of transportation of SNF canisters under Part 71, the contention is out of scope of this proceeding under 10 C.F.R. § 2.309(f)(1)(iii), as the Board ruled in LBP-19-7.<sup>56</sup>

Describing Alvarez’s conclusions, Petitioner first asserts that because the transportation of thousands of metric tons of SNF is unprecedented “[t]here is no assurance” of doing it safely and in the timeframe ISP proposes.<sup>57</sup> Next, Petitioner raises concerns over transportation of

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<sup>55</sup> *Oconee*, CLI-99-11, 49 NRC at 333–34 (citing Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. at 33,172); see also *Nuclear Management Co.* (Monticello Nuclear Generating Plant), LBP-05-31, 62 NRC 735, 748–49 (2005) (“‘Materiality’ requires that the petitioner show why the alleged error or omission is of possible significance to the result of the proceeding.”).

<sup>56</sup> *ISP*, LBP-19-7, 90 NRC at \_\_ (slip op. at 58) (finding that petitioner’s challenge “an impermissible challenge to Part 71 and is outside the scope of this proceeding”).

<sup>57</sup> Contention 17 at 9. Petitioner references the discussion in Technical Issue #1 of the NWTRB report to support this claim. This section alternatively states, “that transportation of SNF has been

high burnup fuel and potential delays associated with repackaging the hotter fuel that, according to Petitioner, the ER does not address.<sup>58</sup> Then, Petitioner faults the ER as inadequate for not discussing potential damage to SNF during transport.<sup>59</sup> Finally, Petitioner asserts that NEPA requires a discussion of mitigation measures related to costly repackaging of SNF into DOE-prescribed TAD canisters, but policy indecision currently prevents these discussions from happening.<sup>60</sup>

Each of Petitioner's concerns relate to 10 C.F.R. Part 71 requirements, which ISP's Part 72 license application is not required to address. Nor does SEED demonstrate how these concerns contradict the application's acknowledgement that future SNF transportation would have to meet Part 71 specifications. Further, the Board ruled that challenges to general safety concerns about transporting high burnup fuel are outside the scope of this proceeding, stating that U.S. Department of Transportation regulations and 10 C.F.R. Part 71 set the standards for SNF transportation, not Part 72.<sup>61</sup> ER Section 1.3.1.1 states that SNF transportation from commercial reactor sites to the proposed CISF "requires a transportation package that is approved and certified by the NRC in accordance with 10 C.F.R. Part 71."<sup>62</sup> The ER further describes that the CoC ensures transportation packages keep SNF confined during shipping and that no radiological release is caused by hypothetical severe accident scenarios.<sup>63</sup> The Petitioner fails to show how its reference to the NWTRB report's discussion about repackaging

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accomplished routinely and safely in many countries around the world, including the U.S., for decades." NWTRB Report at 38.

<sup>58</sup> Contention 17 at 9-10 (referencing the discussion of Technical Issue #13 in the NWTRB report at 77-79).

<sup>59</sup> *Id.* at 10.

<sup>60</sup> *Id.* at 17-18.

<sup>61</sup> ISP, LBP-19-7, 90 NRC at \_\_ (slip op. at 64).

<sup>62</sup> ER at 1-8.

<sup>63</sup> *Id.*

hotter SNF and related shipping delays raises a specific dispute with the ER or an issue material to NRC's review. Rather, the report states, “[i]f conditions are found that do not meet the requirements of the transportation CoC, DOE (or the CoC holder) will have to address and correct those issues before the affected SNF can be transported.”<sup>64</sup> SEED fails to explain how this statement is inconsistent with ISP’s application, which acknowledges that future SNF transportation would comply with Part 71; in any event, the hypothetical future identification of conditions that would not meet those requirements is beyond the scope of this licensing action.<sup>65</sup> Thus, the SNF transportation safety issues and associated environmental impacts that SEED postulates, based on Alvarez’s declaration, are immaterial to the findings NRC must make in this proceeding and fail to demonstrate a specific dispute on a material issue of fact or law. The Board also ruled that any challenge to an NRC cask CoC, including the six cask systems in ISP’s application, “is an impermissible challenge to NRC regulations under 10 C.F.R. § 2.335.”<sup>66</sup>

Much like Joint Petitioners Contention 1, SEED asserts that segmenting transportation of SNF from storage in the environmental review of ISP’s application circumvents NEPA.<sup>67</sup> SEED asserts that because the NWTRB report “significantly expands the expected time period” for transporting SNF to the proposed CISF, the scope of the environmental review must include transportation of SNF.<sup>68</sup> SEED also asserts that 10 C.F.R. § 72.108 requires the evaluation of environmental impacts of SNF transportation.<sup>69</sup> However, the applicant’s proposed action

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<sup>64</sup> NWTRB Report at 79.

<sup>65</sup> Proposed Application section 1.1 at 1-3 states, “Transportation of the [SNF] shipping casks from the originating commercial nuclear reactor to the CISF will be performed in accordance with 10 C.F.R. [Part] 71 and the originating reactor licenses and is not part of this License Application.”

<sup>66</sup> *ISP*, LBP-19-7, 90 NRC at \_\_ (slip op. at 48).

<sup>67</sup> Contention 17 at 11-12.

<sup>68</sup> *Id.* at 12.

<sup>69</sup> *Id.* at 13.

remains unchanged – it is for a specifically licensed ISFSI, not for a transportation package CoC addressed under 10 C.F.R. Part 71. While 10 C.F.R. § 72.108 requires consideration of transportation impacts in the environmental review, the board in *Holtec* concluded that the regulation “does not require that the environmental report prove the safety of transportation packages,” because 10 C.F.R. Part 71 already addresses these issues.<sup>70</sup>

Perhaps more importantly, SEED also ignores the sections of the ISP ER that do in fact analyze the potential environmental impacts associated with transportation of SNF; SEED simply fails to address or specifically dispute those analyses.<sup>71</sup> Thus, as the Board ruled in its Contention 1, Petitioner does not show that a genuine dispute exists on a material issue of law or fact.<sup>72</sup>

Rather than dispute parts of ISP’s ER that discuss transportation issues, SEED in effect contests the adequacy of NRC regulations establishing the requirements for an applicant’s ER under 10 C.F.R. Part 51 and Part 72. SEED asserts “the travel-worthiness of high burnup SNF and its potential damage from shipping” and “when to require standardized TAD canisters” as its basis for claiming that impacts from SNF transportation must be considered under 10 C.F.R. § 51.45(b)(1).<sup>73</sup> But NRC regulations, the ER, and the Board’s ruling in LBP-19-7 all show that SEED’s claims are fundamentally outside the scope of this proceeding. These claims seek to expand a Part 72 proceeding into a dispute over the adequacy of (and future compliance with) Part 71 requirements, and thereby challenge the NRC’s Part 72 and NEPA-implementing regulations under Part 51 in violation of 10 C.F.R. § 2.335(a).<sup>74</sup>

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<sup>70</sup> *Holtec Int’l* (HI-STORE Consolidated Interim Storage Facility), LBP-19-4, 89 NRC 353, 415 (2019) (citation omitted).

<sup>71</sup> See e.g., ER §§ 4.2.4, 4.2.6, 4.2.7, 4.2.8.

<sup>72</sup> *ISP*, LBP-19-7, 90 NRC at \_\_ (slip op. at 68).

<sup>73</sup> Contention 17 at 16.

<sup>74</sup> See *ISP*, LBP-19-7, 90 NRC at \_\_ (slip op. at 69).

For these reasons, SEED has not demonstrated its new contention is within the scope of this proceeding, is material to NRC's review, or raises a genuine dispute with the applicant, in contravention of 10 C.F.R. § 2.309(f)(1)(iii), (iv), and (vi).<sup>75</sup> Thus, because Petitioner has not demonstrated that Contention 17 meets all the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), the Board should find it inadmissible.

### **Conclusion**

For the reasons set forth above, the Board should deny admission of SEED's proposed new Contention 17.

Respectfully submitted,

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

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Dated in Rockville, MD  
this 18th day of November 2019

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<sup>75</sup> See *Millstone*, CLI-01-24, 54 NRC at 358.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

**BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

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 Answer in Opposition to Sustainable Energy and Economic Development Coalition's New Contention 17," dated November 18, 2019, have been served upon the Electronic Information Exchange (the NRC's E-Filing System), in the above-captioned proceeding, this 18th day of November 2019.

**/Signed (electronically) by/**

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Dated in Rockville, MD  
this 18th day of November 2019