

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of

INTERIM STORAGE PARTNERS LLC

(WCS Consolidated Interim Storage Facility)

Docket No. 72-1050

NRC STAFF'S ANSWER IN OPPOSITION TO
SIERRA CLUB'S APPEAL OF LBP-19-7 AND LBP-19-9

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TABLE OF CONTENTS

| | |
|--|----|
| Introduction | 1 |
| Background..... | 1 |
| Discussion | 4 |
| I. Applicable Legal Standards | 4 |
| A. Review of Decisions on Petitions to Intervene under 10 C.F.R. § 2.311 | 4 |
| B. Legal Requirements for Contention Admissibility | 5 |
| II. The Commission Should Affirm the Board’s Determinations on Contention Admissibility | 6 |
| A. Contention 1 (Nuclear Waste Policy Act) | 7 |
| B. Contention 4 (Transportation Risks) | 8 |
| C. Contention 6 (Earthquakes)..... | 11 |
| D. Contention 9 (Decommissioning Costs)..... | 13 |
| E. Contention 10 (Groundwater Impacts)..... | 14 |
| F. Contention 11 (Alternative Sites) | 16 |
| G. Contention 13 / Amended Contention 13 (Wildlife Impacts) | 18 |
| H. Contention 14 (Impacts Beyond Licensing Period of Storage Containers)..... | 21 |
| I. Contention 16 (High Burnup Fuel Risks) | 22 |
| Conclusion | 24 |

TABLE OF AUTHORITIES

Judicial Opinions

| | |
|---|----|
| <i>City of Grapevine v. U.S. Dep’t of Transp.</i> , 17 F.3d 1502 (D.C. Cir. 1994) | 17 |
|---|----|

Commission Legal Issuances

| | |
|--|------|
| <i>AmerGen Energy Co.</i> (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006)..... | 5, 6 |
| <i>Dominion Nuclear Conn., Inc.</i> (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349 (2001) | 5 |
| <i>Dominion Nuclear Conn., Inc.</i> (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207 (2003) | 6 |
| <i>Dominion Nuclear Conn., Inc.</i> (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231 (2008)..... | 4 |
| <i>Duke Energy Corp.</i> (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328 (1999)..... | 6 |
| <i>Energys Nuclear Operations, Inc.</i> (Indian Point, Unit 2), CLI-16-5, 83 NRC 131 (2016)..... | 5 |
| <i>Exelon Generation Co., LLC</i> (Clinton ESP Site), CLI-05-29, 62 NRC 801 (2005)..... | 6 |
| <i>Fla. Power & Light Co.</i> (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215 (2017) | 4 |
| <i>Hydro Resources, Inc.</i> (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31 (2001)..... | 17 |
| <i>Int’l Uranium Corp.</i> (White Mesa Uranium Mill), CLI-01-21, 54 NRC 247 (2001) | 4 |
| <i>NextEra Energy Seabrook, LLC</i> (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301 (2012)..... | 6, 9 |
| <i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125 (2004)..... | 6 |
| <i>Private Fuel Storage, L.L.C.</i> (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318 (1999) | 5 |
| <i>Progress Energy Carolinas, Inc.</i> (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-10-9, 71 NRC 245 (2010) | 4 |
| <i>S. Nuclear Operating Co.</i> (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214 (2011)..... | 4 |
| <i>System Energy Res., Inc.</i> (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10 (2005) | 10 |
| <i>USEC Inc.</i> (American Centrifuge Plant), CLI-06-9, 63 NRC 433 (2006) | 5 |

Atomic Safety and Licensing Appeal Board Decisions

| | |
|---|---|
| <i>Phila. Elec. Co.</i> (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13 (1974)..... | 6 |
|---|---|

Atomic Safety and Licensing Board Decisions

| | |
|---|--------|
| <i>Entergy Nuclear Vt. Yankee, LLC (Vermont Yankee Nuclear Power Station), LBP-06-14, 63 NRC 568 (2006)</i> | 5 |
| <i>Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC __ (Aug. 23, 2019) (slip op.)</i> | passim |
| <i>Interim Storage Partners LLC (WCS Consolidated Interim Storage Facility), LBP-19-9, 90 NRC __ (Nov. 18, 2019) (slip op.)</i> | passim |

Regulations

| | |
|-------------------------------|-----------|
| 10 C.F.R. § 2.309(f)(1) | passim |
| 10 C.F.R. § 2.311 | 1, 4 |
| 10 C.F.R. § 2.335 | 6, 14, 22 |
| 10 C.F.R. § 51.23 | 21, 22 |
| 10 C.F.R. § 51.45 | 11, 16 |
| 10 C.F.R. Part 71 | 22, 23 |
| 10 C.F.R. Part 72 | passim |

Other Authorities

| | |
|---|--------|
| Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah (Final Report), NUREG-1714, vols. 1-2 (Dec. 2001) | 9 |
| Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004) | 6 |
| Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (Final Report), NUREG-2157, vol. 1 (Sept. 2014) | 21, 22 |
| 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), corrected, 83 Fed. Reg. 45,288 (Sept. 6, 2018) | 2 |
| Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 83 Fed. Reg. 44,070 (Aug. 29, 2018) | 12 |

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Introduction

Pursuant to 10 C.F.R. § 2.311(b), the U.S. Nuclear Regulatory Commission Staff files this answer in opposition to the appeal filed by Sierra Club. Sierra Club challenges the rulings of the Atomic Safety and Licensing Board in LBP-19-7 and in LBP-19-9. Because Sierra Club has not shown that the Board committed an error of law or abused its discretion, the Commission should affirm the Board's decisions.

Background

By letter dated April 28, 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.¹ About a year later, WCS requested that the NRC temporarily suspend all review activities associated with its application, and the next day WCS and the Staff jointly requested that the then-pending hearing opportunity

¹ 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) (ADAMS Accession No. ML16132A533).

be withdrawn.² 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 LLC (ISP), a joint venture between WCS and Orano CIS, LLC.³

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*.⁴ In response, Sierra Club submitted a petition to intervene and requested a hearing.⁵ Multiple other petitioners also filed hearing requests and petitions to intervene.⁶ The Board held oral arguments on standing and contention admissibility on July 10-11, 2019, in Midland, Texas.

² *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)).

³ 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 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)). Specific references to the proprietary version of the SAR Revision 2 are designated as such.

⁴ *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).

⁵ *Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club* (Nov. 13, 2018) (ML18317A411) (Sierra Club Petition); see also *NRC Staff Consolidated Answer* (Dec. 10, 2018) (ML18344A594) (NRC Staff Answer to Sierra Club); *Interim Storage Partners LLC's Answer Opposing Hearing Request and Petition to Intervene Filed by Sierra Club* (Dec. 10, 2018) (ML18344A684) (ISP Answer to Sierra Club); *Sierra Club's Reply to Answers Filed by Interim Storage Partners and NRC Staff* (Dec. 17, 2018) (ML18351A531) (Sierra Club Reply).

⁶ *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 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,*

On August 23, 2019, the Board issued its Memorandum and Order LBP-19-7, granting Sierra Club's petition and denying the other petitions.⁷ The Board held that Sierra Club demonstrated standing and admitted Sierra Club Contention 13, in part, "solely as a contention of omission" regarding the availability of ecological studies referenced in ISP's Environmental Report (ER).⁸ The Board found Sierra Club's other 16 proffered contentions inadmissible.

On September 4, 2019, ISP provided the ecological studies to the NRC to supplement its ER and the next day served them on the docket of this proceeding via the Electronic Information Exchange.⁹ ISP then filed a motion to dismiss Sierra Club Contention 13 as moot, claiming that the studies it provided cured the omission.¹⁰ The Staff agreed that ISP had cured the omission, while Sierra Club opposed the motion to dismiss.¹¹

On September 13, 2019, Sierra Club filed an amended Contention 13 based on the four studies.¹² On November 18, 2019, the Board issued LBP-19-9, in which it dismissed Sierra

Sustainable Energy and Economic Development Coalition, and Leona Morgan, Individually, to Intervene and Request for an Adjudicatory Hearing (Nov. 13, 2018) (ML18317A433).

⁷ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-7, 90 NRC ___, ___ (Aug. 23, 2019) (slip op. at 106).

⁸ *Id.* at ___ (slip op. at 17, 56). These studies are referenced at ER § 3.5.16.

⁹ See Letter from Jack Boshoven, ISP, to Document Control Desk, NRC, *ISP Transmittal Letter E-55041 Providing Supplemental Information Regarding References from the Environmental Report Chapter 3, Description of the Affected Environment, Docket 72-1050* (Sept. 4, 2019) (ML19248C915); Letter from Paul Bessette, Counsel for ISP, to the Board, *Licensing Board Notification Regarding ISP Letter E-55041* (Sept. 5, 2019) (ML19248C912).

¹⁰ *Interim Storage Partners LLC's Motion to Dismiss Sierra Club's Contention 13 as Moot and Terminate This Proceeding* (Sept. 9, 2019) at 3 (ML19252A322).

¹¹ *Sierra Club Resistance to ISP's Motion to Dismiss Sierra Club's Contention 13* (Sept. 13, 2019) (ML19255G961).

¹² *Sierra Club's Motion to Amend Contention 13* (Sept. 13, 2019) (ML19256C635); *Sierra Club's Amended Contention 13* (Sept. 13, 2019) (ML19256C638); see also *ISP's Answer Opposing Sierra Club's Motion to Amend Contention 13* (Oct. 1, 2019) (ML19274E207); *NRC Staff Answer Opposing Sierra Club Amended Contention 13* (Oct. 7, 2019) (ML19280D549); *Sierra Club's Reply to ISP's Answer to Sierra Club's Motion to Amend Contention 13* (Oct. 7, 2019) (ML19280A027); *Sierra Club's Reply to NRC Staff's Answer to Sierra Club's Motion to Amend Contention 13* (Oct. 14, 2019) (ML19287A021).

Club Contention 13 and found its amended Contention 13 inadmissible under 10 C.F.R.

§ 2.309(f)(1)(vi).¹³ Sierra Club now appeals the Board's rulings in LBP-19-7 with respect to Contentions 1, 4, 6, 9, 10, 11, 13, 14, 16; and in LBP-19-9 with respect to amended Contention 13.

Discussion

I. Applicable Legal Standards

A. Review of Decisions on Petitions to Intervene under 10 C.F.R. § 2.311

The NRC's regulations at 10 C.F.R. § 2.311(c) provide an appeal as of right on the question of whether a petition to intervene or request for hearing should have been granted. On threshold matters such as standing and contention admissibility, the Commission 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.¹⁴ 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."¹⁵ Rather, a valid appeal "must point out the errors in the [b]oard's decision."¹⁶ In addition, an argument made before the board but not reiterated or explained on appeal is considered abandoned.¹⁷

¹³ *Interim Storage Partners LLC* (WCS Consolidated Interim Storage Facility), LBP-19-9, 90 NRC ___, ___-___ (Nov. 18, 2019) (slip op. at 13-14).

¹⁴ *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).

¹⁵ *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Units 6 and 7), CLI-17-12, 86 NRC 215, 219 (2017) (citations omitted).

¹⁶ *Id.*

¹⁷ *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).

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.”¹⁸ Pursuant to that section, a contention must:

- (i) provide a specific statement of the issue of law or fact to be raised or controverted;
- (ii) provide a brief explanation of the basis for the contention;
- (iii) demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents, that support the petitioner's position and upon which the petitioner intends to rely at hearing; and
- (vi) provide information sufficient to show that a genuine dispute with the applicant/licensee exists in regard to a material issue of law or fact, including references to specific portions of the application that the petitioner disputes, or in the case of an application that is asserted to be deficient, the identification of such deficiencies and supporting reasons for this belief.¹⁹

The Commission has strictly applied these contention admissibility requirements in NRC adjudications.²⁰ Failure to comply with any one of these criteria is grounds for the dismissal of a contention.²¹ The requirements are intended to “focus litigation on concrete issues and result in a clearer and more focused record for decision.”²² The Commission has stated that it “should not have to expend resources to support the hearing process unless there is an issue that is

¹⁸ *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”).

¹⁹ 10 C.F.R. § 2.309(f)(1).

²⁰ *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 recons. denied*, CLI-02-01, 55 NRC 1 (2002)).

²¹ *Private Fuel Storage, LLC* (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).

²² Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).

appropriate for, and susceptible to, resolution in an NRC hearing” as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.²³ The Commission has emphasized that attempting to satisfy these requirements by “[m]ere ‘notice pleading’ does not suffice.”²⁴ A contention must be rejected where, rather than raising an issue that is concrete or litigable, it reflects nothing more than a generalization regarding the petitioner’s view of what the applicable policies ought to be.²⁵

The Commission has also emphasized that “contentions shall not be admitted if at the *outset* they are not described with reasonable specificity or are not supported by some alleged fact or facts *demonstrating* a genuine material dispute” with the applicant.²⁶ The hearing process is reserved “for genuine, material controversies between knowledgeable litigants.”²⁷ In addition, 10 C.F.R. § 2.335(a) prohibits, absent waiver, a challenge to a Commission rule or regulation in any adjudicatory proceeding subject to 10 C.F.R. Part 2.

II. The Commission Should Affirm the Board’s Determinations on Contention Admissibility

In LBP-19-7, the Board rejected 16 of Sierra Club’s 17 contentions and admitted Contention 13, in part, as a contention of omission. In LBP-19-9, the Board dismissed Contention 13, finding that ISP cured the omission, and rejected Sierra Club’s amended Contention 13 for failing to satisfy the admissibility requirements of 10 C.F.R. § 2.309(f)(1). On

²³ *Id.*

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

²⁵ *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 129 (2004) (citing *Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20–21 (1974)).

²⁶ *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 307 (2012) (quoting *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 335 (1999)).

²⁷ *Seabrook*, CLI-12-5, 75 NRC at 307 (quoting *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-14, 58 NRC 207, 219 (2003)).

appeal, Sierra Club claims the Board erred in its rejection of nine of these contentions. For the reasons stated below, the Commission should affirm the findings of the Board.

A. Contention 1 (Nuclear Waste Policy Act)

Initially in this contention, Sierra Club challenged the authority of the NRC to license an away-from-reactor CISF under the Nuclear Waste Policy Act (NWPA) and the Atomic Energy Act of 1954, as amended (AEA). Further, Sierra Club asserted that the application was premised on the U.S. Department of Energy (DOE) taking title to the spent nuclear fuel, which Sierra Club asserted was illegal pursuant to the NWPA.²⁸ In its answer, the Staff argued that the contention was inadmissible because the contention failed to raise a genuine dispute with the application or demonstrate how the issue raised was material to the Staff review. With respect to the challenge to the authority of the NRC to license a CISF, the Staff asserted that this was a challenge to NRC Part 72 regulations.²⁹ The Board found the contention inadmissible for failure to raise a genuine dispute with the application, because the application included the option of ISP contracting directly with nuclear power plant owners that currently hold title to their spent nuclear fuel.³⁰ Further, the Board found the challenge to the authority to license the CISF to be an impermissible challenge to NRC regulations.³¹ On appeal, Sierra Club contends that “as long as DOE ownership is presented as a possible alternative, that alternative violates the NWPA.”³²

In its ruling on a substantially similar Beyond Nuclear contention, the Board assumed that the NWPA does prohibit DOE ownership of the spent fuel, but acknowledged that ISP “may

²⁸ Sierra Club Petition at 15–21.

²⁹ NRC Staff Answer to Sierra Club at 76–77.

³⁰ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 30).

³¹ *Id.*

³² Sierra Club Appeal at 8.

hope that Congress changes the law to allow it the option of contracting directly with DOE.”³³ The Board further stated that it would not assume that ISP would violate the law, nor would it assume that DOE would be complicit in a violation of the NWPA.³⁴ On appeal, Sierra Club does not specify any legal error with this holding. Rather, Sierra Club asserts that ISP intends to use the license as leverage to encourage Congress to change the law, and expresses its view that the NRC should not be a party to this kind of political maneuvering.³⁵ Whether or not Sierra Club’s concerns prove true, it does not now articulate an error of law or abuse of discretion in the Board’s decision. Thus, the Commission should affirm the decision.

B. Contention 4 (Transportation Risks)

In Contention 4, Sierra Club asserted that the ER does not adequately address the radiological risks of transportation accidents.³⁶ The Board found that Sierra Club, in proposing an alternative to ISP’s analysis of the consequences of severe rail accidents involving spent nuclear fuel, failed to “present some factual or expert basis for why the proposed changes in the analysis are warranted.”³⁷ Therefore, the Board rejected the contention, finding Sierra Club failed to raise a genuine dispute with the application.³⁸ In addition, because Sierra Club failed to acknowledge ISP’s analysis in ER Section 4.2.8 of the likelihood of transportation accidents, the Board held that Sierra Club also failed to raise a material dispute, contrary to 10 C.F.R. § 2.309(f)(1)(vi).³⁹

³³ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 27).

³⁴ *Id.*

³⁵ Sierra Club Appeal at 9.

³⁶ Sierra Club Petition at 31; *see also ISP*, LBP-19-7, 90 NRC at ___–___ (slip op. at 34–35).

³⁷ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 36).

³⁸ *Id.* at ___–___ (slip op. at 36–38).

³⁹ *Id.* at ___ (slip op. at 37).

In its appeal, Sierra Club refers to three sources that it also relied on to support its contention in its Petition:⁴⁰ (1) a 2001 study of worst case spent nuclear fuel transportation accidents (Resnikoff study);⁴¹ (2) the Final Environmental Impact Statement for the Private Fuel Storage ISFSI in Tooele County, Utah (PFS EIS);⁴² and (3) a declaration by Dr. Gordon Thompson that describes potential impacts from the transportation of spent fuel to the proposed CISF.⁴³ The standard for overturning the Board's contention admissibility decisions is a deferential one, and Sierra Club does not show that the Board made a legal error or abused its discretion by finding that Sierra Club, in relying on these sources, did not raise a genuine dispute with the application.⁴⁴

In reiterating, on appeal, its claim concerning radiological risks from a rail accident by referencing the Resnikoff study, Sierra Club again does not show why ISP's analysis is unreasonable.⁴⁵ Sierra Club does not dispute the Board's reasoning that an applicant is not required to conduct a "worst case" analysis, but that "the proper question is . . . whether the analysis that was done is reasonable under [the National Environmental Policy Act (NEPA)]."⁴⁶ Most important, Sierra Club fails to show that the Board erred or abused its discretion by ruling

⁴⁰ ISP Appeal at 9–10; see *also* Sierra Club Petition at 33–43.

⁴¹ Matthew Lamb, Marvin Resnikoff, & Robert Morgan, "Worst Case Credible Nuclear Transportation Accidents: Analysis for Urban and Rural Nevada" (Aug. 2001), <http://www.state.nv.us/nucwaste/trans/rwma0108.pdf>.

⁴² "Final Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah" (Final Report), NUREG-1714, vols. 1-2 (Dec. 2001) (ML020150217, ML020150238).

⁴³ Declaration of Dr. Gordon Thompson (ML18317A413) (Thompson Declaration).

⁴⁴ *ISP*, LBP-19-7, 90 NRC at __–__ (slip op. at 36–38).

⁴⁵ Sierra Club Appeal at 9–10.

⁴⁶ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 36) (citing *Seabrook*, CLI-12-5, 75 NRC at 323).

that Sierra Club did not “identify both specific portions of ISP’s [ER] that Sierra Club disputes and “the supporting reasons for each dispute.”⁴⁷

In its appeal, Sierra Club also states that the PFS EIS is one of the documents that ER Section 4.2.6 relies on.⁴⁸ The ER refers to this document to show that the results of a WCS study, which is discussed in ER Section 4.2.6 and concerns radiological impacts associated with the transportation of spent fuel to the proposed CISF site, are consistent with previous NRC studies.⁴⁹ But Sierra Club fails to show that the ER’s reference to the PFS EIS demonstrates an inadequacy in the ER’s discussion of radiological impacts from transportation. Sierra Club also renews its assertion, based on the Thompson Declaration, that rail accidents would cause public exposure to radiation and radioactive contamination to the environment.⁵⁰

Fundamentally, despite Sierra Club’s claim that it “was very specific in identifying” that its contention focused on the asserted inadequacy of ER Section 4.2.6, it fails to identify any error of law or abuse of discretion by the Board.⁵¹ As the Board made clear, Sierra Club failed to engage with parts of the application (ER Section 4.2.8) that directly address the transportation risks, including potential rail accidents, that it challenges.⁵² It is established Commission

⁴⁷ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 36).

⁴⁸ Sierra Club Appeal at 10.

⁴⁹ ER § 4.2.6.2 at 4-14 to 4-16 (“The NRC has also analyzed the radiological impacts from transporting [spent nuclear fuel] in several [EISs] supporting other licensing actions and found the radiological impacts to be small.”) *Id.* at 4-15.

⁵⁰ Sierra Club Appeal at 10.

⁵¹ *Id.*

⁵² *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 37) (“With respect to the likelihood of transportation accidents, Sierra Club does not acknowledge that section 4.2.8 of ISP’s environmental report contains such an analysis.”).

precedent that to raise a genuine dispute, a petitioner must dispute the full application and not flyspeck the applicant's ER.⁵³

In sum, Sierra Club fails to identify an error of law or an abuse of discretion in the Board's decision to reject Contention 4.⁵⁴ Rather, Sierra Club simply renews its claims that ISP's description of transportation risks is inadequate. Therefore, the Commission should affirm the Board's ruling.

C. Contention 6 (Earthquakes)

In Contention 6, Sierra Club challenged the adequacy of the application's consideration of earthquake potential at the proposed CISF site in accordance with 10 C.F.R. §§ 51.45 and 72.103(f)(1).⁵⁵ Sierra Club asserted that ISP's ER and Safety Analysis Report (SAR) neglected to discuss induced seismicity related to oil and gas activity in the Permian Basin region near the proposed site.⁵⁶ For support, Sierra Club provided a map of oil and gas drilling in the area and a Stanford University report that it asserted shows that the earthquake potential in the vicinity of the proposed site is significant.⁵⁷ Sierra Club also claimed it could not access the SAR's Seismic Hazard Evaluation because it was not publicly available.⁵⁸

⁵³ *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005).

⁵⁴ Sierra Club's contention also included claims regarding the potential consequences of a "sabotage event" involving spent fuel in transit. Sierra Club Petition at 41. Although Sierra Club does not raise that issue on appeal, the Board found this issue, consistent with Commission precedent, to be outside the scope of this proceeding. *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 37). Sierra Club does not acknowledge that basis for the Board's determination, let alone show that it entails any legal error or abuse of discretion.

⁵⁵ Sierra Club Petition at 49; see also Sierra Club Appeal at 10.

⁵⁶ Sierra Club Petition at 52–53.

⁵⁷ *Id.* at 51–52; see also Sierra Club Appeal at 11.

⁵⁸ Sierra Club Petition at 52.

The Board found that Sierra Club failed to show a genuine dispute with the application on a material issue of fact regarding its environmental claims related to earthquake potential. Contrary to Sierra Club's assertion, the Board showed that the ER "does discuss seismic effects of drilling in the area and concludes that [there is] relatively low seismic hazard at the CISF site."⁵⁹ The Board also rejected Sierra Club's claim that the SAR was inadequate because the Seismic Hazard Evaluation at Attachment D was not publicly released. The Board ruled that Sierra Club had chosen not to seek access to the non-public information contained in the application (including proprietary and security-related information) through the available NRC procedures for doing so and that in turn, contrary to 10 C.F.R. § 2.309(f)(1)(iii), Sierra Club's generic complaints about these procedures were not within the scope of this proceeding.⁶⁰

In its appeal, Sierra Club refers to the same studies and revisits its claim that the ER fails to discuss induced earthquakes, as described in the studies.⁶¹ However, Sierra Club fails to identify any error of law or abuse of discretion by the Board. In its ruling, the Board identified specific sections of the ER that discuss induced seismicity and that find that "the site area was characterized as one of relatively low seismic hazard."⁶² Sierra Club does not show that the Board erred in rejecting the contention for failure to raise a genuine dispute with the application.

Sierra Club also renews its claim that the SAR inadequately evaluates earthquake potential and that it lacked access to the Seismic Hazard Evaluation.⁶³ Sierra Club fails to even

⁵⁹ *ISP*, LBP-19-7, 90 NRC at ___–___ (slip op. at 41–42) (citing ER § 3.3.3 at 3-12).

⁶⁰ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 42). As the Board explained, Sierra Club had the opportunity to access the proprietary information in ISP's application, including the Seismic Hazard Evaluation in SAR Attachment D, by following the procedure described in the *Federal Register* notice for this proceeding. But Sierra Club chose not to. *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 42); see Order Imposing Procedures for Access to Sensitive Unclassified Non-Safeguards Information and Safeguards Information for Contention Preparation, 83 Fed. Reg. 44,070, 44,073 (Aug. 29, 2018).

⁶¹ Sierra Club Appeal at 11.

⁶² ER § 3.3.3 at 3-12.

⁶³ Sierra Club Appeal at 11.

acknowledge, let alone show legal error or abuse of discretion in, the Board's ruling that Sierra Club's own choice not to seek access to this information was why Sierra Club failed to articulate a genuine dispute with the relevant portions of the SAR's seismic analysis.⁶⁴

Sierra Club fails to identify a legal error or abuse of discretion by the Board in its determination that Contention 6 does not present an admissible environmental or safety claim concerning earthquake potential at the proposed CISF site. Therefore, the Commission should affirm the Board's decision.

D. Contention 9 (Decommissioning Costs)

As initially proffered, Sierra Club challenged the exemption that ISP sought from 10 C.F.R. § 72.30 as well as ISP's decommissioning cost estimate.⁶⁵ The Staff agreed that this challenge to the proposed exemption was admissible, but the challenge to the decommissioning cost estimate was not.⁶⁶ On June 3, 2019, ISP withdrew its proposed exemption request.⁶⁷ Sierra Club did not move to amend its proposed contention, and indeed at oral argument stated it was unaware of the withdrawal of the proposed exemption.⁶⁸ The Board ruled that the portion of the contention that challenged the proposed exemption was moot in light of the withdrawal of the exemption. The Board further held that the portion of the contention challenging the cost estimate was inadmissible for failure to raise a genuine dispute with the application.⁶⁹ On

⁶⁴ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 42).

⁶⁵ Sierra Club Petition at 60–63.

⁶⁶ NRC Staff Answer to Sierra Club at 102.

⁶⁷ Letter from Timothy P. Matthews, Counsel for ISP, to the Board, *Licensing Board Notification Regarding ISP Letter E-54257* (June 3, 2019), at 1 (ML19154A586).

⁶⁸ Transcript of Oral Argument in Interim Storage Partners LLC (July 10, 2019), at 67 (ML19198A218). At oral argument, the Staff agreed that, consistent with its initial position that the contention was only admissible in part, ISP's withdrawal of the proposed exemption request rendered the contention entirely inadmissible. Tr. at 109.

⁶⁹ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 46).

appeal, Sierra Club acknowledges that the exemption request has been withdrawn and makes an unsupported assertion that the application fails to comply with 10 C.F.R. § 72.30.⁷⁰

Sierra Club has neither identified an error of law or abuse of discretion in the Board's decision regarding Contention 9, nor discussed the Board decision in any way. Thus, the Commission should affirm the Board's decision.

E. Contention 10 (Groundwater Impacts)

In Contention 10, Sierra Club argued that the application “does not accurately and adequately evaluate and consider the impacts to the [Ogallala] aquifer” from the proposed facility.⁷¹ Sierra Club asserted that radioactivity may be released from containers stored at the facility and that the application must address these impacts on groundwater.⁷²

The Board rejected Contention 10 on multiple bases. First, the Board ruled that Sierra Club failed to meet 10 C.F.R. § 2.309(f)(1)(v), having offered no expert opinion or facts on: “(1) how a cask would become ruptured in the first place, and (2) how radioactive material from that cask would get into the groundwater.”⁷³ The Board also stated that any challenge to the cask systems certified by certificate of compliance in NRC rulemakings “is an impermissible challenge to NRC regulations under 10 C.F.R. § 2.335.”⁷⁴ Pointing to the proposed ISP facility's location under the jurisdiction of the United States Court of Appeals for the Fifth Circuit, the Board noted that “ISP is not required to review the threat of a terrorist attack” in the ER.⁷⁵

⁷⁰ Sierra Club Appeal at 12.

⁷¹ Sierra Club Petition at 63.

⁷² *Id.*

⁷³ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 48). The Board framed the question of materiality by stating that “[a]ny disagreement concerning the location of the Ogallala Aquifer or the water saturation point at the CISF site is only material to the findings the NRC must make if it is possible for groundwater to be contaminated from a cracked or ruptured cask.” *Id.*

⁷⁴ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 48).

⁷⁵ *Id.* at ___ (slip op. at 49).

Finally, the Board ruled that Sierra Club failed to demonstrate a genuine dispute with the application “concerning how radiation from a cracked spent fuel canister, containing fuel in solid, ceramic pellet form, could reach groundwater.”⁷⁶

In its appeal, Sierra Club simply reiterates its claims regarding ISP’s characterization of groundwater resources, asserting that the ER and SAR incorrectly claim that the Ogallala Aquifer is not present at the ISP site and that both documents’ claims about the saturation point beneath the site may be incorrect.⁷⁷ Sierra Club also points to NRC documents that it claims “show how the radioactive material in the containers would be released to groundwater.”⁷⁸ This, Sierra Club argues, is sufficient support for an admissible contention.⁷⁹

But on its face Sierra Club’s appeal fails to show any error in the Board’s reasoning. As the Board ruled, for Contention 10 to constitute a material dispute, Sierra Club must articulate an inadequacy in the application regarding both how a cask rupture could occur and, then, how radioactive material could reach the groundwater.⁸⁰ Although Sierra Club points to documents that it claims indicate uncertainty regarding the long-term performance of cladding for high-burnup fuel,⁸¹ Sierra Club fails to acknowledge, as the Board noted, that the proposed ISP facility would “only accept six types of cask systems that have already been individually certified and issued [certificates of compliance] by the NRC to safely store spent fuel, including high burnup fuel.”⁸² Further, Sierra Club does not dispute the ER discussion that “[t]here is no air pathway to [public exposure to radiation from routine operations] because the casks are sealed

⁷⁶ *Id.*

⁷⁷ Sierra Club Appeal at 12–13.

⁷⁸ *Id.* at 14.

⁷⁹ *Id.*

⁸⁰ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 48).

⁸¹ Sierra Club Appeal at 13–14.

⁸² *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 48).

by being welded shut” and “[t]here is no potential for a liquid pathway because the spent fuel contains no liquid component and the casks are sealed to prevent any liquids from contacting the spent fuel assemblies.”⁸³ Finally, Sierra Club fails to take issue with the license condition included in the proposed facility license that “all fuel with assembly average burnup greater than 45 GWd/MTHM shall be canned inside the canister,” a protective confinement method permitted by 10 C.F.R. § 72.122(h).⁸⁴ Because of Sierra Club’s failure to dispute these issues, the Board correctly ruled that Sierra Club did not demonstrate how a cask breach could occur and how radioactive material could reach the groundwater.

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

F. Contention 11 (Alternative Sites)

In Contention 11, Sierra Club asserted that the ER does not comply with 10 C.F.R. § 51.45(c), which requires an ER to analyze alternatives to the proposed action, because ISP used 15 site selection criteria that Sierra Club asserts “bear little or no relationship to any criteria in the statutes or regulations.”⁸⁵ Sierra Club also questioned the adequacy of the ER’s analysis with respect to a variety of other issues regarding the site.⁸⁶

The Board rejected Contention 11, ruling that Sierra Club failed to demonstrate a genuine dispute with the application because it did not identify “any authority that requires ISP to use any different criteria.”⁸⁷ The Board recognized that “the site selection process is driven

⁸³ See ER at 6-1 to 6-2.

⁸⁴ License Application, Chapter 13 “Proposed License Conditions,” Attachment A at 2.

⁸⁵ Sierra Club Petition at 68.

⁸⁶ See *id.* at 71–75.

⁸⁷ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 52).

by the purpose and need specified in the application” and that an applicant is accorded flexibility so long as the scope of alternatives in the application “is not artificially narrow as to circumvent the requirement that reasonable alternatives must be considered.”⁸⁸

In its appeal, Sierra Club states “[t]he point of Contention 11 is that the ISP ER does not comply with [NEPA’s requirements]” to describe and evaluate all reasonable alternatives.⁸⁹

Sierra Club disagrees with the Board’s conclusion that its claims about the ER’s inadequate analysis of issues under the site selection criteria are “flyspecking.”⁹⁰

Sierra Club incorrectly understands the NEPA obligation to evaluate reasonable alternatives; alternatives that are reasonable are those that “‘will bring about the ends’ of the proposed action.”⁹¹ Determining whether alternatives are reasonable—and, therefore, whether they must be considered in detail—is the focus of ISP’s site selection process and criteria. Sierra Club fails to explain how ISP’s development and use of site selection criteria to define the scope of the alternatives analysis abridges NEPA’s “rule of reason” or any other applicable requirement. Nor does Sierra Club explain why the specific “deficiencies”⁹² it alleges are present in the alternative sites discussion make a material difference to any conclusions in the ER. Therefore, these complaints, as the Board noted, amount to “impermissible flyspecking of the Environmental Report.”⁹³

⁸⁸ *Id.* at ___ (slip op. at 51).

⁸⁹ Sierra Club Appeal at 17.

⁹⁰ *Id.* at 17–18.

⁹¹ See *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 55 (2001) (citing *City of Grapevine v. U.S. Dep’t of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (An agency “may take into account ‘the economic goals of a project’s sponsor.’”).

⁹² See Sierra Club Appeal at 17–18.

⁹³ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 51).

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

G. Contention 13 / Amended Contention 13 (Wildlife Impacts)

In Contention 13, Sierra Club challenged the adequacy of the ER's discussion of two lizard species: the Texas horned lizard and the dunes sagebrush lizard.⁹⁴ The Board initially admitted this contention, in part, "solely as a contention of omission" regarding the availability of ecological studies that the ER relied on to describe the proposed project's impacts on the lizards.⁹⁵ ISP subsequently provided the studies to the NRC and served them on the docket of this proceeding.⁹⁶ Sierra Club then filed an amended Contention 13 challenging the adequacy of the studies as outdated and not focused on the CISF site, and asserting that the ER falsely claimed that the proposed project would not impact the lizards.⁹⁷

In LBP-19-9, the Board dismissed Contention 13 as moot and rejected amended Contention 13 for failing to demonstrate a genuine dispute with the application. The Board concluded that amended Contention 13 failed to identify significant discrepancies between the studies' content and the ER's description of the lizards' affected environment.⁹⁸ The Board also found that Sierra Club failed to demonstrate unreasonableness in the ER's discussion about the

⁹⁴ Sierra Club Petition at 78–79. The dunes sagebrush lizard is also commonly called the sand dune lizard. The ER uses that name. Neither lizard is federally listed under the Endangered Species Act. See *Dunes Sagebrush Lizard Species Profile*, U.S. Fish and Wildlife Service Environmental Conservation Online System (ECOS), <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=C03J>, (last visited Jan. 7, 2020); *Texas Horned Lizard Species Profile*, U.S. Fish and Wildlife Service ECOS, <https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=C04Z>, (last visited Jan. 7, 2020). Texas lists the Texas horned lizard as threatened. See ER, Table 3.5-1 "Endangered Species List" at 3-34.

⁹⁵ *ISP*, LBP-19-7, 90 NRC at ___ (slip op. at 56). These studies are referenced at ER § 3.5.16.

⁹⁶ See discussion *supra* at 3; see also *supra* note 9.

⁹⁷ Sierra Club's Amended Contention 13 at 1–5.

⁹⁸ *ISP*, LBP-19-9, 90 NRC at ___, ___ (slip op. at 1, 9).

proposed CISF's impacts on the lizards and did not present facts or expert opinions that would contradict ISP's application.⁹⁹ The Board explained that the ER states that impacts would be small, not that the proposed CISF would have "no impact," as Sierra Club asserted.¹⁰⁰

In addition, the Board rejected as untimely Sierra Club's claim that the studies, ranging from 11 to 22 years old, were outdated.¹⁰¹ The Board stated that ISP previously disclosed the dates of the studies in the ER, "and Sierra Club failed to challenge their age in its initial petition."¹⁰² The Board also noted that it was unaware of, and Sierra Club failed to identify, any requirement—legal or factual—to use newer studies.¹⁰³

In its appeal, Sierra Club reiterates its claim that ER Section 4.5.10 states that the proposed CISF "will have no impact" on the lizards.¹⁰⁴ However, Sierra Club fails to identify any error of law or abuse of discretion by the Board. The Board found, in describing ER Section 4.5.10, that "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 [lizards]. Rather, at most ISP claims that the impact would be 'small.'"¹⁰⁵ Accordingly, the Board correctly found that Sierra Club, in misconstruing statements in the ER, did not show a genuine dispute with the application.

Sierra Club also renews its assertion "that Amended Contention 13 correctly alleged that the ER . . . documented the existence or likely existence of the two lizard species on the

⁹⁹ *Id.* at __ (slip op. at 13).

¹⁰⁰ *Id.* at __ (slip op. at 12).

¹⁰¹ *Id.* at __ (slip op. at 7 n.39) (finding the claim untimely under 10 C.F.R. § 2.309(c)(1)).

¹⁰² *ISP*, LBP-19-9, 90 NRC at __ (slip op. at 7 n.39).

¹⁰³ *Id.*

¹⁰⁴ Sierra Club Appeal at 18. Sierra Club previously made this claim in its Petition to Intervene and in its amended Contention 13. See Sierra Club Petition at 78 and Sierra Club Amended Contention 13 at 1.

¹⁰⁵ *ISP*, LBP-19-9, 90 NRC at __ (slip op. at 12) (citing ER § 4.5.10 at 4-38).

[CISF] site.”¹⁰⁶ But Sierra Club does not show that the Board committed legal error or abused its discretion. In its appeal, Sierra Club references information in ER Section 3.5.2 that the lizards are in the area of the proposed site, and in ER Section 3.5.4 that the Texas horned lizard “has been reported as being present at the [CISF] site and the dunes sagebrush lizard might occur there.”¹⁰⁷ However, ER Section 3.5.4 states that the Texas horned lizard was present on the vastly larger WCS property, which spans over 14,000 acres, not on the 332-acre CISF site within the WCS property.¹⁰⁸ As the Board explained, “the affected property would constitute a small percentage of ISP’s holdings and a small percentage of the suitable habitat throughout the region.”¹⁰⁹ Further, the Board stated that “[n]either species was specifically identified at the site in any survey.”¹¹⁰ Sierra Club does not show that the Board erred in finding the contention inadmissible for failing to raise a material dispute with the application.

Sierra Club also asserts that ISP’s description of the lizards as “highly adaptable” is contradicted by other descriptions in the ER that the Texas horned lizard is listed by the state as threatened and the dunes sagebrush lizard has specialized habitat throughout much of the region.¹¹¹ But, as the Board emphasized, “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” and, therefore, does not show a genuine dispute.¹¹² Additionally, Sierra Club, on appeal, does not refute the Board’s assessment that Sierra Club had failed to identify any legal requirement regarding the age of the studies at issue in amended Contention 13.

¹⁰⁶ Sierra Club Appeal at 20.

¹⁰⁷ *Id.* at 18.

¹⁰⁸ ER at 3-34.

¹⁰⁹ *ISP*, LBP-19-9, 90 NRC at ___ (slip op. at 12).

¹¹⁰ *Id.* at ___–___ (slip op. at 12–13).

¹¹¹ Sierra Club Appeal at 19.

¹¹² *ISP*, LBP-19-9, 90 NRC at ___ (slip op. at 13).

Because Sierra Club does not refute the Board's reasoning but simply restates its claims that ISP's ER and the studies it relied on are inadequate and outdated, it has neither identified an error of law nor an abuse of discretion. The Commission should affirm the Board's ruling.

H. Contention 14 (Impacts Beyond Licensing Period of Storage Containers)

In Contention 14, Sierra Club asserted that the ER must discuss the environmental impacts of ISP's canister storage systems being used beyond their service life because of the possibility of "indefinite storage" at the ISP CISF.¹¹³ Additionally, Sierra Club claimed the "canisters to be used at the ISP facility cannot be inspected, repaired or repackaged" and that the ER "makes no mention of dealing with damaged or leaking containers."¹¹⁴

The Board agreed with the Staff and ISP that Contention 14 was inadmissible.¹¹⁵ The Board rejected the environmental aspects of the contention as an impermissible challenge to the Continued Storage Rule at 10 C.F.R. § 51.23 and the associated Generic Environmental Impact Statement (GEIS), and it rejected the challenge to the safety aspects as outside the scope of this proceeding and for failure to raise a genuine dispute with the application.¹¹⁶

The Board did not err or abuse its discretion in rejecting the admission of Contention 14. With respect to Sierra Club's assertion that the ER must analyze the impacts of "indefinite storage," the Board correctly found that this contention was a challenge to the Commission's Continued Storage Rule and GEIS.¹¹⁷ In its appeal, Sierra Club claims that the ER and SAR must analyze the impacts beyond the initial 20-year "license period" for storage containers

¹¹³ Sierra Club Petition at 79–80.

¹¹⁴ *Id.* at 81–82.

¹¹⁵ *ISP*, LBP-19-9, 90 NRC at ___ (slip op. at 57).

¹¹⁶ *Id.* at 58.

¹¹⁷ *Id.*

because there is no guarantee the containers will be relicensed.¹¹⁸ Sierra Club's appeal continues to advance an improper challenge to the Continued Storage Rule and associated GEIS. Since Sierra Club did not request or receive a waiver as required under 10 C.F.R. § 2.335, it cannot pursue its challenge in this individual licensing proceeding. Therefore, the Commission should affirm the Board's ruling on Contention 14.

I. Contention 16 (High Burnup Fuel Risks)

In Contention 16, Sierra Club broadly asserted that the application does not specifically address the transportation and storage risks of high burnup fuel.¹¹⁹ Sierra Club claimed the application does not permit high burnup fuel, and that, because most newly generated spent fuel is considered high burnup, both the SAR and ER must specifically address the challenges that arise from its use.¹²⁰

The Board agreed with the Staff and ISP that Contention 16 was inadmissible.¹²¹ The Board found that Sierra Club's Contention 16 did not raise a genuine dispute with the application because the ER addresses impacts of high burnup fuel on both transportation and storage.¹²² The Board also ruled that the contention was outside the scope of the proceeding because U.S. Department of Transportation regulations and 10 C.F.R. Part 71 establish transportation standards for spent nuclear fuel, and because the SAR allows for storage of high burnup fuel if limitations are followed.¹²³

¹¹⁸ Sierra Club Appeal at 20–21. To clarify, NRC does not license storage containers/casks. Rather, NRC approves casks for storage of spent fuel under conditions specified in their Certificates of Compliance. 10 C.F.R. § 72.214 lists the approved spent fuel storage casks.

¹¹⁹ Sierra Club Petition at 91.

¹²⁰ *Id.* at 91–95.

¹²¹ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 66).

¹²² *Id.* at __–__ (slip op. at 65–66).

¹²³ *Id.* at __–__ (slip op. at 64–65).

In its appeal, Sierra Club claims that the ER is insufficient because it does not specifically contain the transportation mode, routes and estimated transportation distance from the senders to the ISP facility, treatment and packaging procedure for radioactive wastes, radiological dose for incident-free scenarios to the public and workers, and impacts of operating transportation on the environment.¹²⁴ However, the scope of this proceeding is defined by ISP's application for a license to build and operate a CISF under 10 C.F.R. Part 72. ISP has not requested approval of a new transportation package design or a specific transportation route, and, as the Board correctly found, the safety and security of spent fuel transportation is addressed by standards established by U.S. Department of Transportation regulations and 10 C.F.R. Part 71.¹²⁵ As such, the Board correctly ruled that Sierra Club's general safety concerns about transporting high burnup fuel are outside the scope of this proceeding.¹²⁶

The Board likewise correctly found that Sierra Club's claim about the safety of storing high burnup fuel at the proposed CISF was outside of the scope of the proceeding, as it improperly challenged the certification of NRC-approved cask designs, which are incorporated by reference into the SAR.¹²⁷ Since Sierra Club identified no error of law or abuse of discretion with respect to the Board's ruling on Contention 16, the Board's decision should be affirmed.

¹²⁴ Sierra Club Appeal at 21–22.

¹²⁵ *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 64).

¹²⁶ *Id.*

¹²⁷ *Id.* at __–__ (slip op. at 64–65).

Conclusion

Sierra Club has not demonstrated an error of law or abuse of discretion by the Board in either LBP-19-7 or LBP-19-9. Accordingly, the Commission should affirm the Board's decisions.

Respectfully submitted,

/Signed (electronically) by/

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Dated in Rockville, MD
this 7th day of January 2020

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 Sierra Club’s Appeal of LBP-19-7 and LBP-19-9,” dated January 7, 2020, have been served upon the Electronic Information Exchange (the NRC’s E-Filing System), in the captioned proceeding, this 7th day of January 2020.

/Signed (electronically) by/

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