UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 72-1050
INTERIM STORAGE PARTNERS LLC	)	ASLBP No. 19-959-01-ISFSI-BD01
(Consolidated Interim Storage Facility)	)	January 7, 2020

INTERIM STORAGE PARTNERS LLC'S ANSWER OPPOSING SIERRA CLUB'S APPEAL OF LBP-19-7 AND LBP-19-9

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I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.311(b), Interim Storage Partners LLC ("ISP") submits this Answer opposing Sierra Club's "Appeal from Atomic Safety and Licensing Board Rulings Denying Admissibility of Contentions in Licensing Proceeding."[1] Sierra Club seeks to appeal two decisions of the Atomic Safety and Licensing Board ("Board"): LBP-19-7,[2] and LBP-19-9.[3] In LBP-19-7, the Board granted Sierra Club's Petition to Intervene and Request for Adjudicatory Hearing ("Petition"),[4] finding Sierra Club demonstrated standing and submitted one admissible contention, Sierra Club contention ("SC-") 13, but rejecting Sierra Club's 16 other proposed contentions as inadmissible. Sierra Club's Appeal seeks reversal of that portion of LBP-19-7 that rejected the admission of eight of those proposed contentions: SC-1, SC-4, SC-6, SC-9,

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1 Sierra Club's Notice of Appeal from Atomic Safety and Licensing Board Rulings Denying Intervention (Dec. 13, 2019) (ML19347E392); Sierra Club's Brief in Support of Appeal from Atomic Safety and Licensing Board Rulings Denying Admissibility of Contentions in Licensing Proceeding (Dec. 13, 2019) (ML19347E441) ("Appeal").

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

3 *Interim Storage Partners LLC* (Consolidated Interim Storage Facility), LBP-19-9, 90 NRC __ (Nov. 18, 2019) (slip op.).

4 Petition to Intervene and Request for Adjudicatory Hearing by Sierra Club (Nov. 13, 2018) (ML18317A411) ("Petition").

SC-10, SC-11, SC-14, and SC-16.[5] In LBP-19-9, the Board later dismissed SC-13 as moot and denied Sierra Club's motion to admit an amended version of that contention, SC-13A.[6] Sierra Club appeals that decision as well.

As explained more fully below, Sierra Club's Appeal fails to establish any error of law or abuse of discretion in either LBP-19-7 or LBP-19-9. The Appeal largely consists of a recitation of each proposed contention and Sierra Club's corresponding arguments in the proceedings below, without any specific allegations of legal error or abuse of discretion. Simply put, Sierra Club disagrees with the result—which is not an adequate basis for Commission review.[7] The Appeal also disregards, and therefore concedes the correctness of, several of the Board's bases for rejecting the proposed contentions.[8] Furthermore, the Appeal raises several unauthorized *new* arguments to dispute the Board's rulings.[9] Accordingly, the Commission should summarily deny the Appeal.

II. PROCEDURAL HISTORY & STANDARD OF REVIEW

The detailed procedural history of this proceeding is set forth in LBP-19-7 and LBP-19-9.[10] The appellate standard of review is set forth in ISP's Answer to Beyond Nuclear, Inc.'s appeal of LBP-19-7.[11]

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

6 *ISP*, LBP-19-9, 90 NRC at __ (slip op. at 5-14).

7 *Shieldalloy Metallurgical Corp.* (Newfield, NJ), CLI-07-20, 65 NRC 499, 503-05 (2007).

8 *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004).

9 *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006); *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 140 (2004).

10 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 6-12); *ISP*, LBP-19-9, 90 NRC at __ (slip op. at 2-4).

11 [ISP]'s Answer Opposing Beyond Nuclear's Appeal of LBP-19-7 at 5-6 (Oct. 15, 2019) (ML19288A287).

III. THE COMMISSION SHOULD DENY THE APPEAL BECAUSE SIERRA CLUB IDENTIFIES NO ERROR OF LAW OR ABUSE OF DISCRETION

A. The Board Correctly Denied SC-1 (NWPA)

SC-1 stated:

> The [U.S. Nuclear Regulatory Commission ("NRC")] has no authority to license the ISP [consolidated interim storage facility ("CISF")] under the [Nuclear Waste Policy Act of 1982 ("NWPA")] nor the [Atomic Energy Act of 1954 ("AEA")]. ISP has said [the U.S. Department of Energy ("DOE")] must take title to the waste, but the NWPA does not authorize DOE to take title to spent fuel in an interim storage facility. The AEA has no provision for licensing a CIS[F].[12]

SC-1 contained three sub-arguments. First, Sierra Club claimed that, under the NWPA statute as currently written, DOE cannot take title to private licensees' spent nuclear fuel for storage at a CISF.[13] But ISP did not dispute this assertion.[14] In fact, ISP acknowledged on the record that, "absent new legislation, the DOE could not lawfully assume ownership of the spent nuclear fuel in the proposed interim storage facility."[15] Thus, the Board correctly found that this aspect of SC-1 failed to raise a genuine dispute as required by 10 C.F.R. § 2.309(f)(1)(vi).[16] The Appeal does not challenge this conclusion.

Second, Sierra Club argued that ISP's application "assumes" that DOE will (illegally) take title to the spent fuel that will be stored at the proposed WCS CISF.[17] As a preliminary matter, ISP's application clearly and consistently states that *either* "[t]he [DOE] *or* other holders of the title to [Spent Nuclear Fuel ("SNF")] at commercial nuclear power facilities (SNF Title

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12 Petition at 14.

13 *Id.* at 16.

14 ISP's Response to the [ASLB's] Questions Regarding the U.S. Department of Energy's Authority under the Nuclear Waste Policy Act at 1 (June 28, 2019) (ML19179A311) ("ISP Response to Board"); Transcript of Oral Arguments in the Matter of [ISP] at 44 (July 10, 2019) (ML19198A218) ("Tr.").

15 ISP Response to Board at 1. *See also* Tr. at 44 ("we agreed that DOE may not, absent statutory change, make use of our facility").

16 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 30) (also referring to its ruling on Beyond Nuclear's NWPA contention); *id*. at 26 (as to Beyond Nuclear's contention, holding that "there is no dispute" on this point).

17 Petition at 14.

Holder(s))" will be the customer(s) for the proposed CISF.[18] But Sierra Club argued (without support or explanation) that it has doubts as to whether "reactor owners would even consider contracting with ISP."[19] In LBP-19-7, the Board held that the question of commercial viability (i.e., whether reactor owners would contract with ISP) is beyond the scope of (and therefore immaterial to) this proceeding and fails to raise a genuine dispute with ISP's Application.[20] This holding is fully consistent with binding Commission precedent explaining that "the NRC is not in the business of regulating the market strategies of licensees or determining whether market strategies warrant commencing operations."[21] The Appeal does not challenge this conclusion.

Sierra Club's third argument was that the NRC's act of licensing an away-from-reactor interim spent fuel storage facility would be *per se* unlawful.[22] The Board correctly held that this unsupported claim is directly contrary to: (1) the plain text of NRC regulations, which expressly allow for the licensing of such facilities,[23] and (2) a ruling by the U.S. Court of Appeals for the District of Columbia Circuit, which explicitly considered this issue and ruled that the NRC has such authority under the AEA, and that the NWPA did not repeal or supersede that authority.[24] Accordingly, the Board properly concluded that SC-1 is inadmissible as unsupported and as an impermissible challenge to NRC regulations, contrary to 10 C.F.R. § 2.335. The Appeal is silent on this discussion in LBP-19-7 as well.

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18 ISP, WCS CISF License Application, Rev. 2 (including the Environmental Report ("ER") and Safety Analysis Report ("SAR")) at 1-1 to 1-2 (July 19, 2018) (ML18206A595) ("Application") (emphasis added). *See also, e.g.*, *id*. at 1-6 to 1-7, Attach. A (Proposed Condition 23), Attach. A, App. D at 2-1.

19 Appeal at 9.

20 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 30) (also referring to its ruling on Beyond Nuclear's NWPA contention); *id*. at 26 (rejecting Beyond Nuclear's essentially identical argument).

21 *Id.* at __ (slip op. at 27) (quoting *La. Energy Servs.* (Nat'l Enrichment Facility), CLI-05-28, 62 NRC 721, 726 (2005) (in turn quoting *Hydro Res., Inc.* (Rio Rancho, NM), CLI-01-4, 53 NRC 31, 48-49 (2001))).

22 Petition at 20.

23 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 30-31 & n.177) (citing 10 C.F.R. Part 72).

24 *Id.* at __ (slip op. at 31 & n.178) (citing *Bullcreek v. NRC*, 359 F.3d 536, 543 (D.C. Cir. 2004)).

On Appeal, Sierra Club appears to combine its second and third arguments into a broad assertion of Board error on the grounds that "[a]n agency cannot license an action that would be illegal."[25] But the "action" that all parties agree would be unlawful under current law is the action of DOE contracting with a private party for interim storage of SNF.[26] Sierra Club cites no support for its implied assertion that DOE would engage in this unlawful action. And as a matter of law, DOE is entitled to a presumption that it will not act unlawfully.[27] Thus, as the Board correctly held, "[t]here is no credible possibility that such contracts will be made in violation of the law."[28] Furthermore, to the extent Sierra Club's theory is that issuing a Part 72 license to ISP somehow would authorize (i.e., "license") DOE to contract with ISP *despite* the NWPA prohibition (i.e., "an action that would be illegal"), its argument is nonsensical and entirely unsupported. Part 72 licenses can only authorize the "receipt, transfer, packaging, and possession of" certain radioactive materials.[29] The NRC has no authority under Part 72 (or otherwise) to authorize DOE contracting activities. Ultimately, Sierra Club has failed to identify any error of law or abuse of discretion in the Board's decision rejecting SC-1.

B. <u>The Board Correctly Denied SC-4 (Transportation Risk)</u>

SC-4 stated:

Operation of the CIS site as proposed by ISP would necessitate the transportation

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25 Appeal at 8.

26 *See also ISP*, LBP-19-7, 90 NRC at __ (slip op. at 27 & n.159) (citing, *e.g.*, [DOE] Final Interpretation of Nuclear Waste Acceptance Issues, 60 Fed. Reg. 21,793, 21,793–94, 21,797 (May 3, 1995); *N. States Power Co. v. U.S. Dep't of Energy*, 128 F.3d 754, 756 (D.C. Cir. 1997) ("The Department also took the position that 'it lacks statutory authority under the [Nuclear Waste Policy] Act to provide interim storage.'") (quoting 60 Fed. Reg. at 21,794); *Ind. Mich. Power Co. v. U.S. Dep't of Energy*, 88 F.3d 1272, 1274 (D.C. Cir. 1996) ("The [DOE] also determined that it had no authority under the NWPA to provide interim storage in the absence of a facility that has been authorized, constructed and licensed in accordance with the NWPA.")).

27 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 27 & n.158) ("A presumption of regularity applies to federal agencies, which should be assumed to act properly in the absence of evidence to the contrary," citing *e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)).

28 *Id.* at __ (slip op. at 29).

29 10 C.F.R. § 72.2(a).

> of the radioactive waste from reactor sites to the CIS facility. Transportation from the reactors to the CIS site carries substantial risks. These risks must be evaluated in the ER.[30]

In support of SC-4, Sierra Club relied on an August 2001 report (developed for intervenors in the Yucca Mountain licensing proceeding) by Matthew Lamb and Marvin Resnikoff titled "Worst Case Credible Nuclear Transportation Accidents: Analysis for Urban and Rural Nevada" ("RWMA Report").[31]

Specifically, Sierra Club purported to challenge ISP's estimates of potential radiation doses from a transportation accident by pointing out that the estimated doses in ISP's ER are smaller than those in the RWMA Report.[32] Sierra Club also claimed that the ER is deficient because it cited three NRC transportation studies (NUREG-1714, NUREG-2125, and NUREG-2157) that evaluated cask systems that purportedly will not be used at the WCS CISF.[33] Likewise, it cited a declaration from Dr. Gordon Thompson that purportedly described "events and impacts" of transportation accidents that allegedly were not "adequately" addressed in the ER.[34] But Sierra Club offered *no explanation* as to how this information demonstrated an alleged defect in ISP's ER. The Petition was silent as to: how the different values in the RWMA Report somehow demonstrated an inadequacy in ISP's ER; how specific cask types (all of which are subject to stringent NRC certification requirements) somehow are material to the analysis of transportation impacts; or which alleged "events and impacts" referenced by Dr. Thompson were not adequately addressed in the ER (much less, how they allegedly were inadequate). Sierra

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30 Petition at 31.

31 *Id.* at 33.

32 *Id*. at 38-39.

33 *See id.* at 41-43. ER Section 4.2.6.2 (ER at 4-14 to 4-16) discusses each of those NRC studies. It notes that "[t]he NRC's assessments have concluded that the risk from radiation emitted from a transportation cask of is a small fraction of the radiation dose received from the natural background; moreover, the risk from accidental release of radioactive material is several orders of magnitude less than previously assessed."

34 *Id.* at 43.

Club made no attempt to dispute the relevant portions of the ER that contained ISP's corresponding analysis of those issues. As the Board correctly held, more is required for an admissible contention.[35] Binding Commission precedent is clear: the mere presentation of an alternative analysis, without a specific *explanation* of how it demonstrates a defect in the application, is insufficient to satisfy 10 C.F.R. §§ 2.309(f)(1)(v)-(vi).[36] On Appeal, Sierra Club offers nothing more than a recitation of its earlier arguments in this regard.

Moreover, Sierra Club's Petition offered no explanation as to how the RWMA Report (by its own terms, a "Worst Case" analysis) somehow would be material to ISP's analysis under the National Environmental Policy Act ("NEPA"). As a matter of law, NEPA entails a rule of reason; analyses are not required to analyze "worst case" scenarios because they "create[] a distorted picture of a project's impacts and waste[] agency resources."[37] Thus, SC-4 also fails to satisfy 10 C.F.R. §§ 2.309(f)(1)(iv).[38] Sierra Club's Appeal is silent on this conclusion.[39]

Sierra Club also argued that the ER's evaluation of the likelihood of transportation accidents is deficient. For example, Sierra Club provided a list (without source attribution) of train derailments and "oil train" fires for the proposition that "train wrecks involving fires" are not "hypothetical or speculative."[40] But as the Board correctly observed, Sierra Club utterly failed to explain how this information could somehow contradict the relevant ISP analysis (which was provided in Section 4.2.8 of the ER) because Sierra Club did not even acknowledge,

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35 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 35-36).

36 *Id*. at __ (slip op. at 35-36) (citing *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 323-24 (2012).

37 *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 352 (2002) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-55 (1989)).

38 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 35-36) (citing *Seabrook*, CLI-12-5, 75 NRC at 323-24).

39 *Millstone*, CLI-04-36, 60 NRC at 638.

40 Petition at 39-40.

much less dispute, that analysis.[41] Thus, it fails to demonstrate any reversible error.

Finally, Sierra Club argued in SC-4 that the ER is inadequate because it does not discuss (1) potential sabotage events, or (2) the costs of decontamination following a transportation accident.[42] But as the Board correctly held, neither of these issues falls within the scope of this proceeding or is material to the NRC Staff's NEPA review.[43] First, the Commission has held NEPA does not require analysis of hypothetical terrorist attacks outside the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit,[44] as is the case for the WCS CISF.[45] Second, the Board properly found that Sierra Club (1) failed to identify any legal requirement in Part 51 that an ER include an estimate of the cleanup costs of a hypothetical SNF transportation accident for purposes of licensing a proposed CISF, and (2) failed to explain why such an analysis is "reasonably necessary" to evaluate the project's environmental consequences under NEPA.[46] The Appeal is silent as to, and thereby concedes, both conclusions.[47] In summary, Sierra Club identifies no error of law or abuse of discretion in the Board's rejection of SC-4.

C. The Board Correctly Denied SC-6 (Earthquake Potential)

SC-6 stated:

> The ER and the subsequent [Environmental Impact Statement ("EIS")] must evaluate the potential for earthquakes at the ISP site and the environmental impact of earthquakes. Likewise, the Safety Analysis Report (SAR) must adequately evaluate the earthquake potential of the proposed site. Both the ER and SAR are

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41 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 37). On appeal, Sierra Club actually *affirms* the Board's finding in this regard. Appeal at 10 (acknowledging the Board's observation that Sierra Club failed to dispute ER § 4.2.8 and confirming that SC-4 *only* disputes the adequacy of ER § 4.2.6).

42 *See* Petition at 31, 38, 42.

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

44 *See AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128-29 (2007), *aff'd by N.J. Dep't. of Envtl. Prot. v. NRC*, 561 F.3d 132, 139-40 (3d Cir. 2009).

45 Texas, the proposed site of the WCS CISF, Application at 1-1, is in the Fifth Circuit. *See* 28 U.S.C. § 41.

46 *La. Energy Servs.* (Nat'l Enrichment Facility), CLI-06-15, 63 NRC 687, 706 (2006) (quoting *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1329 (10th Cir. 2004)) ("An 'FEIS need only furnish such information as appears to be reasonably necessary under the circumstances for evaluation' of a proposed action.").

47 *Millstone*, CLI-04-36, 60 NRC at 638.

inadequate in this respect.[48]

More specifically, Sierra Club asserted that the ER "dismisses the likelihood of earthquakes in the area"; "does not even discuss the impact of earthquakes"; and "makes no mention" of potential earthquakes induced by oil and gas drilling activity in the region.[49] As the Board correctly held, these assertions lack adequate support, and are factually incorrect, because they entirely ignore the extensive seismic discussion (including consideration of induced seismicity from hydrocarbon extraction) presented in the ER[50]—which Sierra Club failed to dispute.[51] For example, the Board correctly explained that ER Section 3.3.2 provides required seismic information, Section 3.3.4 discusses regional faulting, and Section 3.3.3 discusses the seismic effects of drilling in the area and concludes that the "low to moderate rate of background seismicity, even that associated with petroleum recovery activities, results in relatively low seismic hazard at the CISF site."[52] The Appeal merely repeats Sierra Club's baseless arguments from the Petition, claiming the ER "does not even discuss the impact of earthquakes," and "makes no mention of induced earthquakes."[53] Thus, the Board's decision is manifestly correct, and the Appeal identifies no error of law or abuse of discretion in the Board's analysis.[54]

As to the second half of SC-6, Sierra Club argued that the SAR is inadequate because certain details of ISP's seismic analysis are presented in a proprietary attachment to the SAR,[55]

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48 Petition at 49.

49 *Id.* at 49, 50, 52.

50 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 41-42) (citing ER at 3-3 to 3-16, 4-28 to 4-29, 4-64, and 4-70).

51 *See also id.* at __ (slip op. at 42) (correctly noting that Sierra Club's Reply also failed to identify specific portions of the ER it purported to challenge, and in any event proffered inadequate support for the new and untimely arguments regarding the adequacy of the ER, first presented therein, because the cited documents merely contained facts already addressed in the ER). The Appeal also does not challenge this conclusion.

52 *Id.* at __ (slip op. at 41-42) (quoting ER at 3-12).

53 Appeal at 10-11.

54 *See Shieldalloy*, CLI-07-20, 65 NRC at 503-05.

55 *See* SAR at 2-28 (referring the reader to Attach. D).

rather than the publicly-available body of the SAR.[56] But the regulation cited by Sierra Club (10 C.F.R. § 72.103(f)(1)) does not support its claim of inadequacy. That regulation merely requires a seismic analysis. It does not require the full analysis to be presented in any particular part of the SAR; and it does not require the analysis to be non-proprietary. Thus, Sierra Club's argument lacks the support required by 10 C.F.R. § 2.309(f)(1)(v). And as the Board correctly noted, Sierra Club (and other members of the public) were afforded the opportunity to access the proprietary attachment, but chose not to.[57] In other words, Sierra Club failed to dispute the relevant portion of the ER, contrary to 10 C.F.R. § 2.309(f)(1)(vi). And to the extent Sierra Club sought to challenge the NRC's process for accessing proprietary information,[58] the Board appropriately held that such arguments are beyond the scope of this proceeding, contrary to 10 C.F.R. § 2.309(f)(1)(iii).[59] The Appeal includes no discussion of the Board's analysis on this point, and therefore identifies no error of law or abuse of discretion.[60]

D. <u>The Board Correctly Denied SC-9 (Decommissioning Financial Assurance)</u>

SC-9 stated:

> 10 C.F.R. § 72.30 establishes requirements for decommissioning interim storage facilities. An application for licensing a CIS facility must contain a decommissioning plan explaining how the plan will satisfy the requirements in the regulation. The application for the ISP CIS facility does not comply with these requirements. [61]

By way of background, the Application as *originally* submitted explained that ISP planned to satisfy the requirements in 10 C.F.R. § 72.30 via the use of an authorized

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56 Petition at 52-53.

57 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 42) (citing NRC, [ISP]'s Waste Control Specialists Consolidated Interim Storage Facility Revised License Application; Opportunity to Request a Hearing and to Petition for Leave to Intervene, 83 Fed. Reg. 44,070, 44,073-75 (Aug. 29, 2018)).

58 Tr. at 58-59.

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

60 *Millstone*, CLI-04-36, 60 NRC at 638.

61 Petition at 60.

decommissioning funding mechanism specified in Section 72.30(e) (e.g., a sinking fund combined with a surety bond), regardless of whether ISP's customer was DOE or a private entity.[62] For the scenario in which DOE would be ISP's customer, the original Application included an additional alternative in the form of an exemption request under 10 C.F.R. § 72.7 for approval of an equivalent method of assurance (provided via contract with DOE).[63]

Sierra Club's primary focus in SC-9 was its challenge to ISP's exemption request.[64] As the Board accurately noted in LBP-19-7, ISP subsequently *withdrew* that exemption request and amended the Application accordingly.[65] Thus, the Board correctly found that Sierra Club's challenge to the exemption request—*i.e.*, the core of SC-9—was moot.[66] On appeal, Sierra Club does not challenge, and therefore concedes, this conclusion.[67]

Sierra Club also initially argued that the Application fails to meet the requirements of 10 C.F.R. § 72.30 because it does not "give a detailed cost estimate of the total cost of decommissioning."[68] But this statement is entirely unsupported, contrary to 10 C.F.R. § 2.309(f)(1)(v), because the "Site Specific Decommissioning Cost Estimate" is explicitly provided in ISP's "Decommissioning Funding Plan,"[69] which Sierra Club neither acknowledged nor disputed with specificity. Accordingly, the Board correctly rejected this argument for failing to raise a genuine dispute with the Application, as required by 10 C.F.R. § 2.309(f)(1)(vi).[70] By

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62 *See, e.g.*, Application, App'x D at 2-1.

63 *Id*.

64 Petition at 61-62.

65 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 46) (citing Letter from T. Matthews to ASLB, "Licensing Board Notification Regarding ISP Letter E-54257" at 1 (June 3, 2019) (ML19154A586) ("ISP June 3, 2019 Letter")).

66 *Id.* at __ (slip op. at 46).

67 *Millstone*, CLI-04-36, 60 NRC at 638.

68 Petition at 60.

69 Application, App'x D, ch. 3.

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

not addressing this conclusion either, the Appeal concedes its correctness.[71]

On appeal, Sierra Club presents an entirely *new* argument for the first time. More specifically, it appears to challenge the as-revised Application (following ISP's withdrawal of the exemption request) because it allegedly "still contemplates that DOE would provide the decommissioning funding," and otherwise fails to include "any plan for decommissioning funding."[72] Notably, Sierra Club never sought to amend SC-9 (or to submit new contentions) to challenge the as-revised Application.[73] And because this argument is presented for the first time on appeal, it does not identify any error of law or abuse of discretion in LBP-19-7.[74] Ultimately, nothing in the Appeal presents a basis to overturn the Board's decision.

E. The Board Correctly Denied SC-10 (Groundwater Impacts)

SC-10 stated:

> The ISP CIS site sits atop the Ogallala Aquifer. The ER and SAR submitted by ISP appear to claim that the site does not sit atop the aquifer. Therefore, the ER and SAR do not accurately and adequately evaluate and consider the impacts to the aquifer from the CIS facility.[75]

Sierra Club also alleged ISP's discussion of the water beneath the proposed WCS CISF site is defective, alleging "[i]t is important to know how susceptible the groundwater is to

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71 *Millstone*, CLI-04-36, 60 NRC at 638.

72 Appeal at 12.

73 *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-28, 56 NRC 373, 383 (2002) (where a contention is superseded by subsequent revision of the license application, the contention must be disposed of or modified).

74 *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140. In any event, Sierra Club's new argument is unsupported and fails to raise a genuine dispute with the content of the as-revised Application because, contrary to Sierra Club's assertion, it still presents ISP's plan to use a decommissioning financial assurance method authorized in 10 C.F.R. § 72.30(e) (e.g., a sinking fund combined with a surety bond) that will be funded directly or indirectly by ISP's customer (whether DOE or a private entity). Application § 1.6.3, Attach. A (License Conditions), & App. D at 2-1 (each as revised per ISP June 3, 2019 Letter, Encl. 2 at 1). To the extent Sierra Club asserts the private entity option is not commercially viable, or that the mere mention in the Application of DOE as a potential future customer could somehow authorize DOE to violate the NWPA, these arguments were properly rejected by the Board, as noted in the discussion of SC-1, *supra* Part III.A.

75 Petition at 63.

contamination from a leak of radioactive material."[76] As support for its contention, Sierra Club offered a report prepared by geologist Dr. Patricia Bobeck, who opined that "the [ER] fails to provide the basic information necessary to adequately and thoroughly address the impact of cask rupture and discharge of radioactive material to ground and groundwater at the [ISP] site."[77] As the Board explained, the crux of SC-10's argument relies on unsupported assumptions that (1) a cask at the WCS CISF somehow could become ruptured, and (2) that rupture would release radioactive material capable of getting into groundwater.[78]

As to the first assumption, Sierra Club speculated that the storage of high burnup fuel ("HBF"), or induced seismicity from petroleum recovery operations in the region, somehow could cause a cask rupture.[79] But as the Board correctly observed, all casks at the WCS CISF must be approved by the NRC to safely store spent fuel (including HBF) and shown to withstand credible seismic events.[80] Because the NRC's findings in this regard are codified in NRC regulations,[81] the Board appropriately concluded that Sierra Club's contrary assertions (i.e., that casks approved for HBF storage cannot safely store HBF, or that NRC-approved casks cannot withstand credible seismic events) amount to impermissible challenges to NRC regulations,

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76 Petition at 64. Sierra Club did not challenge the Application's discussion of aquifer location or saturation point as pure factual matters; rather, it argued that these topics influence the groundwater impacts analysis. *See* Appeal at 14 ("The contention is challenging the adequacy of the discussion in the ER regarding *impacts to groundwater*" (emphasis added)). *See also ISP*, LBP-19-7, 90 NRC at __ (slip op. at 48) (explaining that Sierra Club's claims regarding aquifer location and saturation point are only material (as required by 10 C.F.R. § 2.309(f)(1)(iv)) to the extent they affect the groundwater impacts analysis).

77 Petition, Attach. 1, Patricia Bobeck, Ph.D., P.G., "Geologic Review of Interim Storage Partners LLC WCS Consolidated Storage Facility Environmental Report," at 10 (Oct. 25, 2018) ("Bobeck Report").

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

79 *Id*. at __ (slip op. at 65-67). Sierra Club also asserts that cask rupture could occur as a result of a terrorist attack. Bobeck Report at 3. As discussed *supra* Part III.B, the NRC does not require ERs to address the impacts of terrorist attacks at facilities, such as the WCS CISF, that are outside the 9th Circuit.

80 *Id.* at __ (slip op. at 48).

81 *See* 10 C.F.R. § 72.214.

contrary to 10 C.F.R. § 2.335.[82]

On appeal, Sierra Club claims that the Board erred in this conclusion because Sierra Club did not *intend* SC-10 as a challenge to NRC regulations.[83] But this argument is unpersuasive. Intentional or not, the fact remains that SC-10's groundwater contamination theory necessarily relies on assumptions regarding the likelihood of cask ruptures that not only are unsupported, contrary to 10 C.F.R. § 2.309(f)(1)(v), but also are directly contrary to NRC-codified findings, contrary to 10 C.F.R. § 2.335. The Board's conclusion in this regard is fully supported, and the Appeal identifies no error of law or abuse of discretion.

As to the second assumption, the Board aptly cited controlling Commission precedent requiring that, "[t]o show a genuine material dispute, [a petitioner's] contention would have to give the Board reason to believe that contamination . . . could find its way outside of the cask."[84] The Board correctly found that Sierra Club failed to support its assumption that SNF or GTCC waste—solid materials in dry storage with no transport mechanism—somehow could reach groundwater.[85]

On appeal, Sierra Club challenges this conclusion on the ground that its Petition cited documents that discuss the possibility of cladding failure in HBF.[86] But this argument reveals no error of law or abuse of discretion in the Board's reasoning. The cited documents still offer no explanation as to how contamination from solid SNF (even SNF with failed cladding) somehow could "find its way outside the cask," much less how it somehow could find its way to groundwater. And the Appeal does not argue otherwise. Moreover, this argument disregards the

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

83 Appeal at 14.

84 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 49) (citing *PFS*, CLI-04-22, 60 NRC 125, 138-39 (2004)).

85 *Id.* at __ (slip op. at 49).

86 Appeal at 13-14 (citations omitted).

fact that all HBF at the WCS CISF will be further isolated in an inner can, inside the welded canister, within the outer storage cask.[87] This creates yet another barrier between groundwater and the materials in the cask that these documents (and Sierra Club's unsupported theory) fail to acknowledge or address. Such a scenario—layering speculation upon guesswork—is not a reasonably-foreseeable one requiring analysis under NEPA. Ultimately, Sierra Club identifies no error of law or abuse of discretion.

F. The Board Correctly Denied SC-11 (Site Selection Criteria)

SC-11 stated:

> Section 2.3.3 of the ER discusses 15 criteria ISP used to evaluate the suitability of the Andrews County site. These criteria were created by ISP and bear little or no relationship to any criteria in the statutes or regulations. Even the criteria that are relevant have not been adequately addressed.[88]

As to Sierra Club's first claim—that ISP's site selection criteria allegedly are unrelated to unspecified criteria in "the statues or regulations"—the Board correctly observed that Sierra Club failed to *identify* any statutes or regulations that purportedly specify any mandatory site selection criteria.[89] And in fact, no such criteria exist.[90] On appeal, Sierra Club does not contest, and therefore concedes the correctness of, this conclusion.[91] Thus, at the most basic level, SC-11 fails even to articulate a basis for the contention, as required by 10 C.F.R. § 2.309(f)(1)(i)-(ii), much less does it demonstrate the requisite support, materiality, or existence of a genuine dispute with the Application, as required by 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

In its Reply pleading, Sierra Club attempted to reframe its argument as a broader

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87 ISP License Application, Attach. A, Proposed License Conditions at unnumbered A-3 (Proposed License No. SNM-1050) at § 9.

88 Petition at 68.

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

90 *Id.* at __ (slip op. at 51) (citing NRC Staff Answer at 110 (in turn, citing *Duke Energy Carolinas, LLC* (William States Lee III Nuclear Station, Units 1 & 2), CLI-16-19, 84 NRC 180, 210 (2016))).

91 *Millstone*, CLI-04-36, 60 NRC at 638.

challenge to the ER's satisfaction of "requirements" allegedly contained in an NRC guidance document and a regulation promulgated by the Council on Environmental Quality ("CEQ").[92] But the provisions cited by Sierra Club simply refer to generic expectations for a NEPA alternatives analysis; they do not contain any prescriptive site selection criteria. And in any event, Sierra Club's Reply offered no specific explanation as to how ISP's ER somehow failed to satisfy these generic expectations. The Board was not persuaded by these new arguments in the Reply.[93] On appeal, Sierra Club does nothing more than repeat these earlier arguments,[94] and therefore fails to demonstrate an error of law or abuse of discretion.[95]

Sierra Club's second claim—that ISP's analysis of the site selection criteria was inadequate—fares no better. More specifically, the Petition presented six topical complaints regarding: site contamination, floodplain analysis, climate data, protected species, socioeconomic data, and archaeological resources.[96] ISP's Answer pleading addressed each topic and explained, point-by-point, why each assertion was variously baseless, factually incorrect, or immaterial, and why none of them raised a litigable issue.[97] The Board properly concluded that these claims amounted to nothing more than impermissible "flyspecking" of the

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92 Sierra Club's Reply to Answers Filed by [ISP] and NRC Staff at 35-36 (Dec. 17, 2018) (ML18351A531). As a general matter, contrary to Sierra Club's assertion, neither NRC guidance nor CEQ regulations impose *any* "requirements" on NRC license applicants. As an independent regulatory agency, the Commission does not consider itself legally bound by substantive regulations of the CEQ. *Vt. Yankee Nuclear Power Corp.* (Vt. Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 284 n.5 (1987). And guidance documents, such as NUREGs, do not have the force of legally binding regulations. *Private Fuel Storage, LLC* (Indep. Spent Fuel Storage Installation), CLI-01-22, 54 NRC 255, 264 (2001).

93 *See ISP*, LBP-19-7, 90 NRC at __ (slip op. at 52 n.300) (denying ISP's motion to strike these new and untimely arguments because the Board would "reach the same decision" with or without them).

94 Appeal at 17.

95 *Shieldalloy*, CLI-07-20, 65 NRC at 503-05.

96 Petition at 71-75.

97 ISP Answer at 94-100. For the sake of brevity, ISP incorporates these arguments here by reference as if fully republished.

ER because they failed to identify any genuine material dispute with the Application.[98] On appeal, Sierra Club disputes this conclusion, claiming that it did "much more" than flyspeck the ER.[99] But the Appeal offers no further explanation or support for this claim; it merely repeats (in paraphrase form) the six topical complaints presented in the Petition.[100] Merely repeating earlier arguments provides an insufficient basis for an appeal.[101]

Ultimately, the Board correctly concluded that ISP's site selection discussion "[came] to grips with all important considerations," and that Sierra Club failed to demonstrate any legal requirement to do more.[102] The Appeal still fails in this regard, and identifies no error of law or abuse of discretion in the Board's conclusion as to SC-11.

G. The Board Correctly Dismissed SC-13 and Denied SC-13A (Important Species)

SC-13 stated:

> The ER states that two species of concern, the Texas horned lizard and the dunes sagebrush lizard, have been seen at the ISP site or may be present. But there is no discussion of any studies or surveys to determine if the species are present and the impact of the project on those species. Therefore, the ER is inadequate in describing the affected environment.[103]

In the Petition, Sierra Club's essential argument was that ISP's conclusion (allegedly, that the WCS CISF will have "no impact"[104] on the Texas horned lizard or the dunes sagebrush lizard ("Lizards")) was inadequately supported because the surveys cited in the ER "are not described well enough to allow members of the public to access the sources."[105] As a general matter, this

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98 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 51-52) (citing *System Energy Res., Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-05-4, 61 NRC 10, 13 (2005)).

99 Appeal at 17.

100 *Id.*

101 *Shieldalloy*, CLI-07-20, 65 NRC at 503-05.

102 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 52) (citing *Grand Gulf ESP*, CLI-05-4, 61 NRC at 13 (quoting *Hydro Res., Inc.*, CLI-01-4, 53 NRC at 71 (2001))).

103 Petition at 78.

104 *Id.*

105 *Id.* at 79.

claim mischaracterizes the ER's conclusion.[106] It does not, as Sierra Club alleged, conclude that the WCS CISF would have "no impact" on the Lizards; rather it concludes for the various reasons discussed in the ER that any impact would be "small."[107] Notwithstanding, the Board admitted SC-13 as a contention of omission "insofar as none of the five references in section 3.5.16 of [the ER] is either sufficiently described to judge its technical adequacy or made publicly available."[108] ISP then supplemented its ER with copies of (or the applicable ADAMS accession numbers for) each of the studies referenced in section 3.5.16 ("Source Documents),[109] thereby curing the alleged omission. Accordingly, the Board properly dismissed SC-13 as moot.[110] Sierra Club's Appeal offers no challenge to this ruling.

Thereafter, Sierra Club moved to admit SC-13A, an amended version of SC-13.[111] Sierra Club's arguments in SC-13A were threefold, claiming that: (1) certain of the now-supplied Source Documents are "outdated"; (2) certain statements in the ER are factually inconsistent with the Source Documents; and (3) ISP's impact conclusion as to the Lizards is "demonstrably false."[112] The Board concluded that Sierra Club's latter two arguments satisfied the procedural standard for submission of a late-filed amended contention.[113] However, the Board rejected

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106 *See ISP*, LBP-19-9, 90 NRC __ (slip op. at 12).

107 *Id*. (citing ER at 4-38); *see also id*. (observing that the ER "candidly acknowledges potential adverse consequences," citing ER at 4-37).

108 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 56). ISP appealed the Board's admission of SC-13. *See* [ISP]'s Notice of Appeal of LBP-19-7 and Brief in Support of [ISP]'s Appeal of LBP-19-7 (Sept. 17, 2019) (ML19260H452). As of the date of this filing, that appeal remains pending before the Commission.

109 Letter from Jack Boshoven, ISP, to NRC Document Control Desk, E-55041, "Supplemental Information regarding References from the ISP Environmental Report (ER) Chapter 3, Description of the Affected Environment. Docket 72-1050 CAC/EPID 001028/L-2017-NEW-0002" (Sept. 4, 2019) (ML19248C915).

110 *ISP*, LBP-19-9, 90 NRC __ (slip op. at 4-5) (citing *Duke Energy*, CLI-02-28, 56 NRC at 383 & *USEC, Inc.* (Am. Centrifuge Plant), CLI-06-9, 63 NRC 433, 444 (2006) (contentions of omission are cured, and therefore moot, when an applicant supplies the missing information)).

111 Sierra Club Motion to Amend Contention 13 (Sept. 13, 2019) (ML19256C635); *see also* Amended Contention 13 (ML19256C638) ("Proposed Amendment").

112 Proposed Amendment at 4.

113 *ISP*, LBP-19-9, 90 NRC at __ (slip op. at 6-7); *but see id.* at __ (Concurring Opinion of Judge Arnold) (concluding that none of Sierra Club's arguments satisfied the procedural standard late-filed contentions).

Sierra Club's first argument as untimely because "the dates of the [Source Documents] were disclosed in [ER] section 3.5.16 from the outset, and Sierra Club failed to challenge their age in its initial petition."[114] On appeal, Sierra Club maintains that its first argument was based on "new information," and should have been admitted.[115] But the Appeal neither challenges the Board's factual observation that the age of the documents was available at the outset of the proceeding, nor explains why it could not have raised this challenge earlier. Accordingly, the Appeal identifies no error of law or abuse of discretion.

Ultimately, the Board unanimously rejected Sierra Club's remaining arguments in SC-13A on contention admissibility grounds because they disregard, rather than dispute, the relevant information in the Source Documents, and otherwise identify no material discrepancies in the ER.[116] For example, Sierra Club asserted that the 1997 Report only examined species within one mile of the WCS Low-Level Radioactive Waste ("LLRW") site, whereas the proposed WCS CISF site is "beyond that one mile radius."[117] As the Board correctly observed, this claim is factually untrue.[118] Sierra Club also opined that the 1997 Report is not a "scientific survey" and merely contains "haphazard random 'observations.'"[119] The Board correctly explained that this assertion is "refuted" by the 1997 Report itself,[120] which describes formal

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114 *Id*. at __ (slip op. at 7 n.39). The Board further noted that Sierra Club failed to cite any "factual or legal requirement to necessarily use newer studies." *Id*. Thus, even if this argument satisfied the procedural standard for submission of a late-filed amended contention, it would still be inadmissible per 10 C.F.R. §§ 2.309(f)(1)(iv)-(vi).

115 Appeal at 20.

116 *ISP*, LBP-19-9, 90 NRC at __ (slip op. at 8-13).

117 Proposed Amendment at 2 (discussing Ecological Assessment of the Low Level Waste Depository, Andrews County, Texas at 3, 4, 7, 108-09 (May 1997) (ML19179A308) ("1997 Report") (Encl. 1 to Letter from T. Matthews to ASLB, "Licensing Board Notification Regarding ISP Letter E-54423" (June 28, 2019)).

118 *ISP*, LBP-19-9, 90 NRC at __ (slip op. at 9) (citing ER at 3-87, clearly showing that the proposed WCS CISF would be within a mile of the LLRW site, and thus within the survey area of the 1997 Report).

119 Proposed Amendment at 2, 5.

120 *ISP*, LBP-19-9, 90 NRC at __ (slip op. at 9-10).

"environmental and ecological surveys," exploring five sites in the region, conducted by a team of five doctoral-level research scientists.[121] The Appeal does not challenge these conclusions.

More broadly, SC-13A argued that ISP's conclusion that the WCS CISF would have "no adverse impact" on the Lizards is "demonstrably false" because the Source Documents "clearly" show that the Lizards and their habitat are present at the WCS CISF site.[122] As a factual matter, none of the Source Documents detail any observations of a Lizard *specifically* at the WCS CISF site.[123] Nevertheless, Sierra Club again mischaracterizes the ER's conclusion.[124] It does not conclude that the WCS CISF would have *no* impact on the Lizards; rather it concludes that any impact would be "small" because, *even if* some Lizards are present specifically at the WCS CISF site, they are highly adaptable.[125] This conclusion is fully supported by the discussion in the ER and the underlying Source Documents, which collectively show that the WCS CISF footprint represents only a tiny fraction of the "several thousand acres" of adjacent Lizard habitat and, as the Board so aptly paraphrased, "lizards have legs."[126]

On appeal, Sierra Club raises a *new* argument challenging the ER's conclusion that the Lizards are "highly adaptable."[127] But again, new arguments on appeal cannot identify errors of

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121 1997 Report at 3, 4, 7, 108-09.

122 Proposed Amendment at 4-5.

123 *ISP*, LBP-19-9, 90 NRC at __ (slip op. at 12-13) (citing ER at 3-34 to 3-35). Sierra Club appears to conflate discussions of Lizard observations in the general "area" as being claims of observations at the site. *Compare, e.g.*, Appeal at 18 (quoting the ER's assertion that Lizards may not be present "on the CISF site") *with id*. at 19) (incorrectly claiming the prior assertion is contradicted by a different assertion that Lizards occur "within the area.")

124 *See ISP*, LBP-19-9, 90 NRC at __ (slip op. at 12).

125 *Id*. (citing ER at 4-38); *see also id*. (observing that the ER "candidly acknowledges potential adverse consequences," citing ER at 4-37).

126 *Id.* at __ (slip op. at 12-13).

127 Appeal at 19 (arguing that the presence of the sand dune lizard's "specialized habitat" in the region of the WCS CISF, and the basis for the Texas horned lizard's listing as "threatened"—i.e., "over-collecting, incidental loss, and habitat disturbance"—*per se* demonstrate the Lizards are not "highly adaptable").

law or abuses of discretion because they were never presented to the presiding officer below.[128] Thus, Sierra Club presents no valid basis to disturb the Board's rulings as to SC-13 and SC-13A.

H. The Board Correctly Denied SC-14 (Container Licensing Period)

SC-14 stated:

> The containers in which the waste will be transported to and stored at the ISP site are licensed for a period of 20 years. ISP hopes to renew the license for an additional 40 years, and then apparently hoping [sic] for additional relicensing to the projected 100-year life of the CIS facility. However, many of the containers will already have been in service for years prior to being shipped to the ISP CIS facility. Furthermore, the Continued Storage Rule assumes that the spent fuel will be transferred to new containers after 100 years. ISP's proposal may present an unacceptable danger of radioactive release. Therefore, the ER must examine the environmental impact of the containers beyond their 20-year licensing period.[129]

Sierra Club's claims in SC-14 were essentially twofold. First, it argued that ISP lacks a plan for dealing with cracking or leaking containers received from its customers, or containers that become cracked or leak during storage at the WCS CISF. As a general matter, the Board appropriately cited the Commission's determination that cracked and leaking canisters in storage, transport, or otherwise is not a credible scenario.[130] Furthermore, to the extent Sierra Club challenged the safety analysis or environmental review for the containers themselves, the Board correctly held that such challenges are beyond the scope of this proceeding because the NRC's safety and environmental approvals are codified in NRC regulations, whereas challenges to NRC regulations are impermissible in adjudicatory proceedings per 10 C.F.R. § 2.335.[131] Sierra Club does not challenge any of these findings on appeal.[132]

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128 *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140. Nevertheless, the information cited by Sierra Club for this new argument comes directly from the ER itself. Appeal at 19 (citing ER § 3.5.2). Thus, the new argument fails to raise a genuine dispute, contrary to 10 C.F.R. § 2.309(f)(1)(vi), because the ER unquestionably has presented this precise information.

129 Petition at 79.

130 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 57) (citing *PFS*, CLI-04-22, 60 NRC at 136-37).

131 *Id.* at __ (slip op. at 57-58).

132 *Millstone*, CLI-04-36, 60 NRC at 638.

Second, Sierra Club's Petition claimed that the ER is insufficient because it fails to consider the potential impacts from the storage of containers beyond the initial licensed life of the WCS CISF and/or the initial licensed life of the containers.[133] This argument is essentially identical to the one raised by Sierra Club in SC-5, which argued the Application was insufficient because ISP did not evaluate indefinite storage assuming the WCS CISF becomes a *de facto* repository.[134] Sierra Club did not appeal, and therefore concedes,[135] the Board's ruling on that contention (which found this argument inadmissible).[136] More specifically, the Board rejected SC-5 as an impermissible challenge to the Continued Storage Rule and Continued Storage Generic EIS.[137] The Board correctly rejected this aspect of SC-14 on the same grounds.[138] Sierra Club's Appeal likewise does not challenge, and therefore concedes, this conclusion.[139]

On appeal, Sierra Club appears to raise a *new* argument, challenging the SAR because it "does not indicate what would happen if there is no license renewal" for the container—*i.e.*, if the container license (known as a Certificate of Compliance or "CoC") expires and is not renewed.[140] Sierra Club claims (without support, because there is none) that ISP's Application improperly assumes container CoC renewals will be "automatic," and argues the Board erred because it did not address this "fallacy."[141] But this new argument fails to identify any error of law or abuse of discretion by the Board, to whom it was never even presented.[142] Ultimately,

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133 Petition at 80.

134 *Id.*

135 *Millstone*, CLI-04-36, 60 NRC at 638.

136 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 38-40).

137 *Id.* at __ (slip op. at 39-40).

138 *Id.* at __ (slip op. at 58).

139 *Millstone*, CLI-04-36, 60 NRC at 638.

140 Appeal at 20.

141 *Id.* at 20-21.

142 *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140. Moreover, the regulations, themselves, specify "what would happen" if the CoC expires and is not renewed—the cask must be "removed from service." 10 C.F.R. § 72.212(a)(3). To the extent Sierra Club demands something more, it identifies no

nothing in the Appeal presents grounds to overturn the Board's rejection of SC-14.

I. The Board Correctly Denied SC-16 (High Burnup Fuel)

SC-16 stated:

> Since the 1990's almost all spent nuclear fuel being generated is high burnup fuel (HBF). HBF causes the cladding to become thinner, creating a higher risk of release of radioactive material. The cladding also becomes more brittle, with additional cracks. This situation causes risks for short-term and long-term dry storage. The SAR, 1.2.4, claims that the cask system to be used for the transportation and storage for the ISP CIS facility will not contain HBF. But the prevalence of HBF requires that the cask systems will need to contain HBF at some point. The SAR and ER must evaluate the risks of HBF.[143]

In short, Sierra Club identifies statements from a few documents about HBF and cladding performance issues, and concludes that the SAR and ER are required to, but do not, evaluate the safety and environmental risks of HBF transportation to, and storage at, the WCS CISF.[144] As the Board correctly concluded, SC-16 is inadmissible for multiple reasons.

As to the environmental portion of SC-16, Sierra Club proffered a contention of omission, claiming that "the ER [does not] discuss at all the likelihood or the impacts of [high burnup fuel] being transported to and stored at the [proposed] facility."[145] However, as the Board correctly observed, ISP's analysis in the ER *does* encompass the possibility of HBF being sent to and stored at the facility.[146] On appeal, Sierra Club purports to find error in this conclusion by raising a *new* argument, asserting that the portions of the ER cited by the Board

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corresponding requirement in Part 72. Nor is there one. Thus, Sierra Club's new argument impermissibly challenges Part 72, contrary to 10 C.F.R. § 2.335, and is out-of-scope, unsupported, immaterial, and fails to demonstrate a genuine dispute with the Application, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

143 Petition at 91.

144 *Id.* at 91-95.

145 *Id.* at 95.

146 ER at 4-12 to 4-16 (providing results of a RADTRAN analysis evaluating transportation impacts using the maximum dose rate allowed under 10 C.F.R. § 71.47(b)(3)); ER at 4-55 to 4-59 (evaluating storage impacts using bounding design basis source terms taken directly from the reactor licensing basis documents for canisters to be sent to the WCS CISF, including those that authorize storage of HBF).

only "indirectly" account for HBF.[147] But this new argument fails to identify any error of law or abuse of discretion in LBP-19-7 because it was never raised before the Board.[148]

From the safety perspective, the Board correctly held that SC-16's challenges as to HBF transportation and storage are both outside the scope of this proceeding.[149] As to storage, the Board accurately explained that ISP will only store NRC-approved storage systems.[150] Accordingly, because the safety of the casks has already been considered in a *different* proceeding, NRC regulations explicitly prohibit challenges in *this* proceeding regarding the safety of the casks.[151] Sierra Club's only remark on appeal is that it did not *intend* SC-16 as a challenge to the safety analysis for the containers.[152] But this argument is unpersuasive. The fact remains that SC-10's storage safety argument inherently challenges NRC-codified findings that are incorporated by reference in the SAR. Thus, intentional or not, this argument is impermissible as a matter of law. Accordingly, the Appeal identifies no error of law or abuse of discretion by the Board in this regard.

Likewise, the Board properly held that Sierra Club's generalized argument regarding transportation safety is outside the scope of this proceeding. More specifically, the Board found that this proceeding is limited to ISP's request for a storage facility license under 10 C.F.R. Part

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147 Appeal at 22. Sierra Club also cites a *new document* as support for its new argument. *See id*. at 21-22 (citing NUREG-1748, Environmental Review Guidance for Licensing Actions Associated with NMSS Programs § 6.4.2 (2003) (ML032450279)).

148 *USEC*, CLI-06-10, 63 NRC at 458; *PFS*, CLI-04-22, 60 NRC at 140. Nevertheless, Sierra Club cites no authority for the proposition that bounding (i.e., "indirect") analyses are impermissible in an ER, or that an ER must use specific language to directly identify HBF by name. Nor are there any such requirements. Additionally, Sierra Club offers no explanation as to what ISP should have done differently in the analyses, given that they used the maximum dose values permitted by law (for transportation) and the design basis source term (for storage). Ultimately, Sierra Club's new argument impermissibly challenges Part 72, contrary to 10 C.F.R. § 2.335, and is out-of-scope, unsupported, immaterial, and fails to demonstrate a genuine dispute with the Application, contrary to 10 C.F.R. §§ 2.309(f)(1)(iii)-(vi).

149 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 64-65).

150 SAR 1-6 to 1-10.

151 *ISP*, LBP-19-7, 90 NRC at __ (slip op. at 65) (citing 10 C.F.R. 72.47(e)).

152 Appeal at 22.

72,[153] whereas the safety and security of SNF transportation is governed by the standards in 10 C.F.R. Parts 71 and 73 and through regulations issued by the U.S. Department of Transportation ("DOT") and subject to separate approval proceedings.[154] The Appeal does not dispute, and therefore concedes, this conclusion.[155] Ultimately, Sierra Club has failed to identify any error of law or abuse of discretion in the Board's decision rejecting SC-16.

IV. CONCLUSION

For the reasons set forth above, the Commission should deny Sierra Club's Appeal.

Respectfully submitted,

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Dated in Washington, D.C.
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Counsel for Interim Storage Partners LLC

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

154 *See Private Fuel Storage LLC* (Indep. Spent Fuel Storage Installation), LBP-99-34, 50 NRC 168, 176-77 (1999) (stating that "shipment of spent nuclear fuel [is] governed by Part 71 and do[es] not require a specific license under Part 72"); *State of N.J.* (Dep't of Law & Public Safety's Requests Dated October 8, 1993), CLI-93-25, 38 NRC 289, 294 (1993); *Trustees of Columbia University in the City of New York*, ALAB-50, 4 AEC 849, 863 (1972) (stating that DOT regulations govern the safety of radioactive material transportation).

155 *Millstone*, CLI-04-36, 60 NRC at 638.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	Docket No. 72-1050-ISFSI
INTERIM STORAGE PARTNERS LLC	)	ASLBP No. 19-959-01-ISFSI-BD01
(Consolidated Interim Storage Facility)	)	January 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that, on this date, a copy of "Interim Storage Partners LLC's Answer Opposing Sierra Club's Appeal of LBP-19-7 and LBP-19-9" was filed through the E-Filing system.

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